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Supreme Court, U.S.
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No. 90-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GARY D. SWANK,
Petitioner,

vs.

JAMES SMART, Individually and as City Marshal, City of Carthage, Illinois; JAMES R. NIGHTINGALE, Individually and as Mayor of the City of Carthage and as a member of the City Council of Carthage, Illinois; WILLIAM TOMLINSON, Individually and as a member of the Public Safety Committee of the City Council of Carthage, Illinois; WILLIAM REED, Individually and as a member of the City Council of Carthage, Illinois; RAYMOND MYERS, Individually and as a member of the City Council of Carthage, Illinois; and the CITY OF CARTHAGE, ILLINOIS, an Illinois Municipal Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the right to go lawfully about one's neighborhood or town on one's own time and engage in incidental conversation with another a right sufficiently "implicit in the concept of ordered liberty" and "deeply rooted in the nation's history and traditions" to be characterized as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment and thereby subject to regulation on a heightened scrutiny basis and, in the case of an off duty municipal police officer, on the basis of the criteria prescribed in *Pickering v. Board of Education,* 391 U.S. 563 (1968)?

2. Is the "public concern" threshold requirement for the First Amendment protection of public employee speech applicable where the speech in question occurs outside the employment context, bears no relationship to the public employment and does not otherwise implicate the public employer's official interests?

3. Is the association of two or more persons which facilitates the carrying on of incidental but clearly articulable expressive activity protected under the First Amendment notwithstanding the rule in *City of Dallas v. Stanglin,* ____ U.S. ____, 109 S.Ct. 1595 (1989), exempting from such protection the "kernel of expression" found in everyday human activity?

PARTIES IN THE COURT BELOW

Petitioner Gary Swank was the Plaintiff-Appellant in the court below. Respondents James Smart, Individually and as City Marshal, City of Carthage, Illinois; James R. Nightingale, Individually and as Mayor of the City of Carthage and as a member of the City Council of Carthage, Illinois; William Tomlinson, Individually and as a member of the Public Safety Committee of the City Council of Carthage, Illinois; William Reed, Individually and as a member of the City Council of Carthage, Illinois; Raymond Myers, Individually and as a member of the Public Safety Committee of the City Council of Carthage, Illinois; and the City of Carthage, Illinois, an Illinois Municipal Corporation, were the Defendants-Appellees in the court below.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties in the Court Below	ii
Table of Authorities	vi
Opinions Below	2
Constitutional Provisions Involved	2
Statement of the Case	3
A. Statement of Facts	3
B. Proceedings In and Jurisdiction of the District Court	6
C. Holding of the Court of Appeals	7
Reasons for Granting the Writ	8
A. The Decision Below Conflicts With Decisions of Other Circuit Courts of Appeals thereby Requiring Resolution by This Court	8
1. The Decision Below Concluding That the Right to Go About One's Neighborhood or Town and Engage in Incidental Conversation is a "Harmless Liberty" as Opposed to a Fundamental Right Conflicts With the Decision of The Third Circuit in *Lutz v. City of York Pa.*, 899 F.2d 255 (3rd Cir. 1990)	8

2. The Decision Below Concluding That Speech by a Public Employee as a Citizen Outside the Employment Context and Unrelated to the Public Employment Must be on a Matter of Public Concern to be Protected Conflicts With The Tenth Circuit's Decision in *Flanagan v. Munger,* 890 F.2d 1557 (10th Cir. 1989) 15

B. The Decision Below Conflicts With This Court's Precedents Prescribing The Means by Which Rights Not Specified in the Text of The Bill of Rights are Determined to be "Fundamental." 20

C. The Decision Below Conflicts With This Court's Precedents Affording First Amendment Protection to Identifiable and Articulable Speech Irrespective of its Social Worth or Public Importance, *City of Dallas v. Stanglin,* ____ U.S. ____, 109 S.Ct. 1591 (1989), Notwithstanding..... 24

Conclusion 30

Appendix A 1a

Appendix B 28a

Appendix C 53a

Appendix D 54a

Appendix E 69a

Appendix F 73a

Appendix G 75a

Appendix H 80a

Appendix I 81a

Appendix J 85a

TABLE OF AUTHORITIES

Page(s)

Cases:

Abrams v. United States, 250 U.S. 616 18

Beaulieu v. U.S., 89-7175, 58 L.W. 3834 (1990)..... 14

Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985) 18

Benigni v. City of Hemet, 853 F.2d 1519 (9th Cir. 1988), as first amended, 868 F.2d 307, and as finally amended, 879 F.2d 473 (9th Cir. 1988)..... 19,29

Board of Regents v. Roth, 48 U.S. 564 (1972) 15

Bolling v. Sharp, 347 U.S. 497 (1954) 15

Bower v. Hardwick, 478 U.S. 186 (1986) 11,22

City of Dallas v. Stanglin, ____ U.S. ____, 109 S.Ct. 1591 (1989) 17,19,22,23,24,25,29

Connick v. Meyers, 461 U.S. 138 (1983) 16,17,18

Cox v. Louisiana, 379 U.S. 536 (1965) 26

Cruzan v. Director, Missouri Dept. of Public Health, ____ U.S. ____, 58 L.W. 4916 (1990) 12,20,22

Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc., 472 U.S. 749 (1985)..... 14

Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989) 15,17,18,26,29

FCC v. Pacifica Found., 438 U.S. 726 (1978)..... 14

Fleisher v. City of Signal Hill, 829 F.2d 1491 (9th Cir. 1987) 13,27

Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973) 27

Fitzgerald v. Porter Memorial Hosp., 523 F.2d 716 (7th Cir. 1975) 23

Fugate v. Phoenix Civil Service Board, 791 F.2d 736 (9th Cir. 1986) 13,27

Griswold v. Connecticut, 381 U.S. 479 (1965) 10,22

IDK, Inc. v. Clark County, 836 F.2d 1185 (9th Cir. 1988) 19

Kelley v. Johnson, 425 U.S. 238 (1976) 9

Kent v. Dulles, 357 U.S. 116 (1958) 11

King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.), *cert. den.*, 404 U.S. 863 (1971) 11

Kukla v. Village of Antioch, 647 F.Supp. 799 (N.D.Ill. 1986) 9

Lochner v. New York, 198 U.S. 45 (1905) 11

Lutz v. City of York, Pa., 899 F.2d 255 (3d Cir. 1990) 8,10,11,12,13,14,22,27

McKenna v. Peekskill Housing Authority, 497 F.Supp. 1217 (S.D.N.Y. 1980), 647 F.2d 332 (2d Cir. 1981). 29

Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) 11

Michael H. v. Gerald D., ____ U.S. ____, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) 10,12,14,20,22

Miller v. School District #167, 495 F.2d 658 (7th Cir. 1974) 14

Mine Workers v. Illinois Bar Assn., 389 U.S. 217 (1967) 16,26

Moore v. City of Cleveland, 431 U.S. 494 (1977)..... 10,20

Mount Healthy School District Board of Education v. Doyle, 429 U.S. 274 (1977) 8

NAACP v. Alabama, 357 U.S. 449 (1958) 19

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 19

New York v. Ferber, 458 U.S. 747 (1982) 14

Palko v. Connecticut, 302 U.S. 319 (1937) 10

Pence v. Rosenquist, 573 F.2d 395 (7th Cir. 1978) 15

Perry v. Sindermann, 408 U.S. 593 (1972) 8

Pickering v. Board of Education, 391 U.S. 563 (1968) 8,9,13,17,18

Poe v. Ullman, 367 U.S. 497 (1961) 10,21,22,23

Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) .26,27,29

Rankin v. McPherson, 483 U.S. 378 (1987) 13,16

Regan v. Wald, 468 U.S. 222 (1984) 11

Roberts v. United States Jaycees, 468 U.S. 609 (1984).....27,28,29

Roe v. Wade, 410 U.S. 113 (1973) 10,22

Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) 29

Shapiro v. Thompson, 394 U.S. 618 (1969) 11

Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983) 9,13

Snyder v. Massachusetts, 297 U.S. 97 (1934) 10

Swank v. Smart, *et al.*, No. 89-1360, 898 F.2d 1247 (7th Cir. 1990) 1

Thomas v. Collins, 323 U.S. 516 (1945) 16,26

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 11,20,22

Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983) 27

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976) 7

Williams v. Fears, 179 U.S. 270 (1900) 11

Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1894)..... 29

Winters v. New York, 338 U.S. 507 (1948) 25,26

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 15

Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) 14

Constitutions:

United States Constitution, Amendment One ..... *passim*

United States Constitution, Amendment Fourteen ..... *passim*

Statutes:

28 U.S.C. §1254(1)..... 2

28 U.S.C. §1331 6

28 U.S.C. §1343 6

Miscellaneous:

1 Blackstone's Commentaries (Cooley Edition, 1889)... 12,20

Caplan, *The History and Meaning of the Ninth Amendment,* 69 Va.L.Rev. 223 (1983) 24

Cardozo, Benjamin, The Paradoxes of Legal Science (Colum., 1928)..... 15

Craven, Jr., *Personhood: The Right to be Let Alone,* 1976 Duke, L.J. 699 15

1 Kurland and Lerner, The Founder's Constitution (1987) 21

Note, *The Supreme Court, 1983 Term, 98* Harv.L.Rev. 87 (1984) 28

No. 90-173

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GARY D. SWANK,
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JAMES SMART, Individually and as
City Marshal, City of Carthage, Illinois;
JAMES R. NIGHTINGALE, Individually and as
Mayor of the City of Carthage and
as a member of the City Council of Carthage, Illinois;
WILLIAM TOMLINSON, Individually and
as a member of the Public Safety Committee
of the City Council of Carthage, Illinois;
WILLIAM REED, Individually and as a member of
the City Council of Carthage, Illinois;
RAYMOND MYERS, Individually and as a member of
the City Council of Carthage, Illinois;
and the CITY OF CARTHAGE, ILLINOIS,
an Illinois Municipal Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Gary Swank respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the case *Swank v. Smart, et al.*, No. 89-1360 reported at 898 F.2d 1247 (7th Cir. 1990), entered March 27, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as set forth above and a copy of that opinion is attached as Appendix A to this Petition. (App. 1a-27a). The opinion of the United States District Court for the Central District of Illinois is unreported and is attached as Appendix B to this Petition. (App. 28a-52a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 27, 1990. A timely Petition for Rehearing was denied April 27, 1990, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). A copy of the Court of Appeals' order denying rehearing is attached as Appendix C to this Petition. (App. 53a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment One:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. United States Constitution, Amendment Fourteen:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner, as of September 24, 1986, was a tenured member of the three man police force in Carthage, Illinois, a small Western Illinois town. App. 1a, 7a.[1] He was off duty on September 24 and 25, 1986. App. 2a. After he had taken his wife to dinner and then home the evening of September 24, 1986, Petitioner proceeded on his motorcycle to find a friend of his who was a member of the Hancock County, Illinois Sheriff's Office. App. 2a. He could not find his friend and rode around the town on his motorcycle looking for him. App. 2a. He drove several times through an intersection near where the Robert Morris College, a business college, was situated. App. 2a. Two girls whom he did not know were at the intersection and waved at him as he went through the intersection. App. 2a. During his last trip through the intersection, one of the girls motioned him over. App. 2a. Petitioner chatted for a short while with the girls and gave one of them, Tina Millin, a ride on his motorcycle. App. 2a. The ride took place sometime between

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[1] He was also on "probation" by reason of two previous deficiencies in his performance. App. 2a, 54a. The Chairman of the Public Safety Committee of the Carthage City Council who put Petitioner on probation felt he had not received good guidance and instruction from the previous police chief who had been fired effective August 1, 1986. App. 55a. Up to the point of the motorcycle ride incident giving rise to this case, Petitioner had corrected the deficiencies. App. 58a-60a, 61a. The Public Safety Committee was prepared to remove Petitioner from probation effective October 1, 1986. App. 61a, 63a. If the motorcycle ride of September 25, 1986, had not occurred, Petitioner would have been removed from probation and not discharged. App. 65a, 66a, 68a.

12:30 a.m. and 1:30 a.m. on September 25, 1986, and lasted 20 or 30 minutes. App. 2a. During the course of the motorcycle ride, Petitioner and Tina Millin discussed Millin's courses at the college, the motorcycle, her opinion of the town of Carthage, and her former boyfriend. App. 2a. At the end of the ride, Petitioner left Tina Millin off where he had found her in the company of the other girl. App. 2a.

Petitioner was seen riding on his motorcycle with Millin by another Carthage policeman who reported that fact to the Chief of Police, Respondent James Smart. App. 2a. The Chief, on hearing that report, assumed that Petitioner either was having or was preparing to have an affair with Tina Millin. App. 69a-72a. Because of that, the Chief determined to remove Petitioner from the police department and offered him an opportunity to resign. App. 2a, 69a-72a. When Petitioner refused to resign, the Chief preferred charges against Petitioner which were presented to the Public Safety Committee of the Carthage City Council on the evening of October 6. 1986. App. 2a. The charges recited the facts of the motorcycle ride which Petitioner admitted. App. 2a-3a. The Chief also charged Petitioner with having lied about the motorcycle ride and with having asked the Chief to make up a false story to placate Petitioner's wife, both of which Petitioner denied.[2] App. 3a. At the conclusion of the Public Safety Committee meeting, Petitioner was suspended with pay pending the next meeting of the Carthage City Council on October 14, 1986. App. 3a.

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[2] Chief Smart's charge against Petitioner is set forth as footnote 1 to the dissenting opinion below and appears in the Appendix to this Petition at App. 20a. At the conclusion of the Public Safety Committee proceeding, Chief Smart tendered to the committee a statement as to his assessment of the harm that Petitioner's motorcycle ride had caused. That statement had been prepared by the Chief before he learned the motorcycle ride was innocent of sexual or romantic involvement. The Chief's "assessment" appears as footnote 2 to the dissenting opi-

(Footnote 2 continued on Page 5)

The matter was presented by the Public Safety Committee to the full Carthage City Council on October 14, 1986. App. 3a. At that time the Public Safety Committee Chairman urged the dismissal of Petitioner. App. 3a. By a vote of 4 to 3, the Council agreed to fire him on the grounds that the motorcycle incident "was his third write up (and) the incident (was) damaging to the good relationship the city police and the city had with the college students and personnel." App. 3a, 73a-74a.[3]

In the early morning hours of October 6, 1986, the day the Public Safety Committee heard and considered the Chief's charges against Petitioner, the Chief learned Tina Millin's identity and questioned her about the incident. App. 2a. She advised the Chief that the ride lasted about 20 minutes and that she and Petitioner had discussed her courses at the college, how she liked the town of Carthage, motorcycles, and her former boyfriend. App. 12a. She advised the Chief that there was no romantic involvement or "physical stuff" between her and Petitioner and that Petitioner had made no statements about seeing her in the future. App. 12a, 75a-79a. The Chief believed her. App. 80a. He made a verbatim summary of his conversation with her. App. 75a-79a, 81a-84a. He made the Public Safety Committee members aware of the fact that he had had a conversation with her but did not advise them of the contents of the

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(Footnote 2 continued)
nion below and appears in the Appendix to this Petition at App. 21a. Chief Smart had no evidence to support any of the statements set forth in his assessment as to the harm allegedly caused by Petitioner's motorcyle ride. App. 21a, 85a-90a. See discussion infra, p. 11, and n.9. However, the Chief would have persisted with his discharge of Petitioner even if he had originally known that all that transpired was a 20 minute motorcycle ride during which Petitioner discussed with Tina Millin her course work, motorcycles, boyfriends, and the town of Carthage. App. 91a-93a.

[3] The record of the Carthage City Council proceedings shows that the three dissenting members felt Petitioner should not be discharged "since the incident of September 25, 1986, occurred while Swank was off duty and on his own time." App. 73a-74a.

conversation because the Mayor had said the committee did not want to know the "gory details." App. 2a. The Chief did not, however, amend his "assessment" as to the supposed effect of the motorcycle ride after he learned from Tina Millin that the motorcycle ride was neither romantic nor sexual. See footnote 2, supra, and App. 21a.

B. Proceedings in and Jurisdiction of the District Court

Petitioner filed suit in the United States District Court alleging that his discharge deprived him his freedom of expressive association guaranteed by the First and Fourteenth Amendments; freedom of individual liberty or substantive due process guaranteed by the Due Process Clause of the Fourteenth Amendment; and property and liberty of occupation interests without procedural due process guaranteed by the Fourteenth Amendment. Jurisdiction of the district court was alleged and admitted under 28 U.S.C. §§1331 and 1343(3). After discovery, the parties filed cross motions for summary judgment. The district court entered summary judgment in favor of the Respondents and against the Petitioner on all Petitioner's claims.

C. Holding of the Court of Appeals

The court of appeals affirmed as to Petitioner's deprivation of individual liberty or substantive due process and freedom of association claims but reversed and remanded as to Petitioner's procedural due process claims respecting his property and liberty of occupation interests. Respecting Petitioner's freedom of expressive association claim, the court of appeals said that Petitioner had no claim unless he was speaking on a matter of public concern. App. 4a, 5a. Because the conversation that took place between Petitioner and Tina Millin on the motorcycle "was too remote from the political rally, the press conference, the demonstration, the theater, or other familiar emporia of the marketplace of ideas . . .", App. 5a, the court said Petitioner's

speech was not protected and the association of Petitioner and Tina Millin which facilitated that speech was not protected. App. 6a.

In affirming the judgment of the district court to the extent it awarded summary judgment to the Respondents on Petitioner's substantive due process or individual liberty claim, the court of appeals said that Petitioner's right to engage in incidental conversation ("chit chat") and to go from one place to another in his own town were "harmless liberties" protected only against arbitrary abridgements. App. 6a. The court said the legal test was "sheer unreasonableness" and held that the decision of the City of Carthage to terminate plaintiff did not violate that test on the record before it.[4] App. 8a.

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[4] On remand in the district court, Petitioner has amended his complaint to allege on due process and equal protection grounds, a violation of the "sheer unreasonableness" test suggested by the Seventh Circuit. The Respondents have moved in the district court to dismiss. The district court, as of the drafting of this Petition, has not ruled on that motion. Even if there is a due process cause of action on other than a "law of the case" basis for "sheer unreasonableness," Petitioner does not perceive that would either moot or make unripe for review the matters raised in this Petition. That is true because at best, "sheer unreasonableness" would presumably be a jury question, see for e.g. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 n. 12 (1976), on which Petitioner's chances would not be certain. On the other hand, if Petitioner were to succeed in this Court, he perceives he is entitled to summary judgment as the record shows the Respondents cannot satisfy the *Pickering* criteria. See infra, notes 6 and 9 and accompanying text.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With Decisions of Other Circuit Courts of Appeals Thereby Requiring Resolution by This Court.

1. The Decision Below Concluding that The Right to Go About One's Neighborhood or Town and Engage in Incidental Conversation is a "Harmless Liberty" as Opposed to a Fundamental Right Conflicts With the Decision of The Third Circuit in *Lutz v. City of York, Pa.*, 899 F.2d 255 (3rd Cir. 1990).

Saying that "federal courts cannot undertake in the name of the Constitution to regulate minutely every restriction that public employers place on their employees. . .", App. 6a-7a, the Seventh Circuit held that Respondents had not violated Petitioner's fundamental rights by discharging him under the facts of this case. The court said that to adopt Petitioner's contention that his fundamental rights had been violated would mean that the Respondent city "could no more discipline an at will employee for flexing his liberties of locomotion, association, and social conversation in the manner in which Swank flexed these liberties when he gave Tina a ride than it could discipline a tenured employee such as Swank himself." App. 7a.[3] There-

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[3] The Seventh Circuit's concerns appear overstated. A non-tenured employee would still be obliged to prove that his conduct was protected and that his protected conduct was the motivating cause of the adverse personnel action. See for e.g. *Mount Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Thus, the right of a public employer to discharge a non-tenured employee for any reason except constitutionally impermissible ones or no reason at all would remain intact. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Additionally, the public employer would have available to it the criteria set forth in *Pickering v. Board of Education*, 391 U.S. 563, 570-575 (1968) and its progeny from which to determine whether the conduct was protected.

fore, on the authority of *Kelley v. Johnson,* 425 U.S. 238, 247-48 (1976), the court said that unless the rights involved were fundamental, Respondents' actions would violate the Due Process Clause only if "utterly unreasonable. . ." App. 7a.[4]

What the Seventh Circuit did not explain was why the right claimed by Petitioner — the right to go about his neighborhood or town and engage in incidental conversation — was not fundamental. But, in an opinion released the day after the Seventh

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[4] *Kelley v. Johnson,* 425 U.S. 238 (1976), does not appear to bear directly upon this case. In *Kelley,* the Court was concerned with a police department rule regulating the length of department members' hair as a matter of the department's operation, dress, and equipment. The regulations served either the department's purpose of making police officers readily recognizable to the public or fostering an esprit de corps. This Court said the department's choices were entitled to the same presumption of legislative validity as other state choices to promote aims within the purview of its police power. That being the case, this Court said that the burden was on the plaintiff to demonstrate that there was no rational connection between the regulation, based as it was on the department's method of organizing its police force, and the promotion of the safety of persons and property. See *Kelley v. Johnson,* supra at 245-247. Moreover, the plaintiff in *Kelley v. Johnson,* the Court made clear, was seeking the protection of the Fourteenth Amendment not as an ordinary citizen but as a law enforcement employee of the county. *Id.* at 245. In this case, the Petitioner is seeking the protection of the Fourteenth Amendment as an ordinary citizen who happens to be a police officer and whose exercise of the right claimed did not and presumably would not occur while he performed his duties as a police officer. Appropriate applications of the *Kelley v. Johnson* principle appear in the Fifth Circuit's decision in *Shawgo v. Spradlin,* 701 F.2d 470, 483 (5th Cir. 1983) and the district court's opinion in *Kukla v. Village of Antioch,* 647 F.Supp. 799 (N.D.Ill. 1986), both holding that police departmental regulations prohibiting cross rank or intra-departmental fraternization valid as appropriate means for insuring discipline. A regulation which restricted off duty conduct in broad (and vague) terms to that which did not bring the department into disrepute or was not unbecoming a police officer would likely be valid under *Kelley v. Johnson,* supra. However, those terms should be understood in light of *Pickering v. Board of Eduction,* supra. Cf. discussion infra at p. 13 and n.9.

Circuit decided this case, the Third Circuit in *Lutz v. City of York, Pa.*, 899 F.2d 255, 268 (3rd Circuit 1990), held that the right asserted by Petitioner in this case is fundamental. It did so directly on the basis of the plurality opinion of this Court in *Michael H. v. Gerald D.*, ____ U.S. ____, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). In turn, the plurality in *Michael H. v. Gerald D.*, said "the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " 105 L.Ed.2d at 105, quoting *Snyder v. Massachusetts*, 297 U.S. 97, 105 (1934). Those traditions, the plurality said, are to be gauged at "the most specific level at which a tradition protecting or denying protection to, the asserted right can be identified." *Michael H. v. Gerald D.*, supra, 105 L.Ed.2d at 108-109 n.6. On that basis the Third Circuit in *Lutz*, supra, held that "the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the nation's history.' " *Lutz*, supra, 899 F.2d at 268.

In so deciding on the basis of what it called the "narrowest conception of substantive due process articulated in recent years. . .", *Lutz*, supra at 267, the Third Circuit adopted the standard for ascertaining as fundamental rights which do not have a textual basis in the Bill of Rights first articulated in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). That standard was orginally phrased as "implicit in the concept of ordered liberty." *Palko*, supra at 325. The methodology for employing that standard was given a forceful explication in Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 539-555 (Harlan, J., dissenting). The standard was amplified by this Court in *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) to include the "deeply rooted in this Nations's history and tradition" element. That standard was applied by this Court in *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment) (saying that the right to decide whether to use and purchase contraceptives is fundamental) *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J.,

dissenting) (arguing that abortion is not a fundamental right); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986) (White, J., dissenting). The standard was further amplified in *Bowers v. Hardwick,* 478 U.S. 186, 194 (1986) to add the element of "cognizable roots in the language and design of the Constitution," (holding that consensual sodomy not a fundamental right).

The Third Circuit in *Lutz,* supra, did not directly include in its substantive due process analysis the right to travel cases, e.g., *Kent v. Dulles,* 357 U.S. 116 (1958), and *Shapiro v. Thompson,* 394 U.S. 618 (1969). It found, on the authority of *Regan v. Wald,* 468 U.S. 222 (1984), those cases to be primarily rooted in the First Amendment.[7] Nor did the court in *Lutz,* supra, rely on *Williams v. Fears,* 179 U.S. 270, 274 (1900), wherein the Court said "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of liberty . . . secured by the Fourteenth Amendment." The *Lutz* court's concern was that *Williams v. Fears,* supra, was decided in the atmosphere and context that gave rise to the broadly based substantive due process exemplified by the now "thoroughly discredited," *Lutz,* supra at 266, *Lochner v. New York,* 198 U.S. 45 (1905).

But, the *Lutz* court might have done well to have relied on *Williams v. Fears* supra. That is true because although not mentioned in the opinion, the *Williams v. Fears* formulation of the right to locomotion mirrors the language of Blackstone who in his Commentaries said:

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[7] As observed by the Third Circuit in *Lutz,* the right alleged as fundamental in this case might be more generally posed as whether there is a fundamental right to intra as distinguished from inter-state travel. *Lutz,* supra, 899 F.2d at 258-262. The Second Circuit has held there is. *King v. New Rochelle Municipal Housing Authority,* 442 F.2d 646 (2d Cir.) *cert. den.,* 404 U.S. 863 (1971). However, that issue was left open by this Court in *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 255-256 (1974).

> Next to personal security, the law of England regards, serves, and preserves the personal liberty of individuals. *This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct. . . .*"

1 Blackstone's Commentaries 123 (Cooley Edition, 1899). (emphasis supplied). As observed by the plurality in *Michael H. v. Gerald D.*, supra, Blackstone is an appropriate source for determining the "deep rootedness in the nation's history and tradition" of a right claimed to be fundamental. See also *Cruzan v. Director, Missouri Department of Public Health*, ____ U.S. ____, 58 L.W. 4916, 4924 (1990), (Scalia, J., concurring). (See discussion infra beginning at page 20.)

Finding the right Petitioner is asserting in this case to be a fundamental right, the court in *Lutz*, supra, undertook to determine the standard of review and to determine whether the "anti-cruising" ordinance which was attacked in *Lutz* withstood scrutiny under that standard.[4] The plaintiffs in *Lutz* sought strict scrutiny meaning that the ordinance should survive "only to the extent that (it) (was) no more restrictive than necessary to achieve compelling state interests." The Third Circuit, however, adopted a doctrine of intermediate scrutiny by allowing something akin to the time, place, and manner restrictions permitted with respect to speech itself. *Lutz*, supra at 269. The court found the ordinance passed muster.

The same approach could be adopted if the right asserted by Petitioner in this case were found to be fundamental. Rather than the strict scrutiny of requiring the least restrictive means of achieving the end of a public employer burdening a fundamen-

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[4] The ordinance in *Lutz* prohibited "unnecessary repetitive driving," meaning driving more than two times in any two hour period on streets past designated traffic control points between the hours of 7 p.m. and 3:30 a.m.

tal liberty, it could be restricted upon first, reasonable time, place and manner restraints in addition to "trivial restraints," e.g. speed regulations, noise regulations, etc. *Lutz*, supra. It could also in the case of a public employee such as Petitioner be restricted upon a showing of those elements broadly stated in *Pickering v. Board of Education*, 391 U.S. 563, 570-575 (1968).

For example, the City could have shown that Petitioner's exercise of the right interfered with his performance of his job, the performance generally by the police department of its function, or otherwise impaired the ability of the police department to credibly deliver its law enforcement services.[9] It could also have shown that Petitioner's exercise of the right impaired discipline or impaired working relationships. *Pickering*, supra at 570-573. See also *Rankin v. McPherson*, 483 U.S. 378, 388-389 (1987). The City could have shown that Petitioner's conduct "disturbed or interrupted or otherwise discredited" the police department or the City of Carthage. *Rankin v. McPherson*, supra at 389. But, in this case, there was no evidence that any of those things had happened. See n. 9, supra. Petitioner would concede that under *Pickering*, supra, a small town police department could probably require its members to conduct themselves in a manner beyond moral or legal reproach. Cf. *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983); *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987); and *Fugate v. Phoenix Civil Service Board*, 791 F.2d 736 (9th Cir. 1986). The failure of one of the members of the small town police department to so conduct him or

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[9] See footnote 1, supra. The Chief did submit to the Public Safety Committee a statement which is set forth in full at footnote 2 of the dissenting opinion to the decision below. It is set forth in the Appendix to this petition at App. 21a. However, the record established that the Chief had no evidence to support any of the propositions set forth in his assessment or opinion evidence. See App. 85a-90a. Petitioner concedes that had there been evidence to support the Chief's assessment, the *Pickering* criteria might have been satisfied and Petitioner thereby subject to appropriate discipline.

herself beyond reproach might impair the ability of that department to credibly deliver its law enforcement services. Cf. footnote 6, supra.

The Third Circuit, in *Lutz*, supra, employing the means prescribed in *Michael H. v. Gerald D.*, supra, and its precursors for determining the existence of a liberty properly characterized as "fundamental," was able to conclude that the right Petitioner has asserted in this case was indeed fundamental. The Seventh Circuit, on the other hand, not employing any method of analysis except a concern that a public employer might be limited in its power to discipline, concluded that the right Petitioner herein is asserting was only a "harmless liberty" subject to regulation on any but a "sheer unreasonableness" basis.[10] It respectfully seems that those two conclusions as to the constitutional foundation of basic human activity are diametrically opposed and irreconcilable. Therefore, the conflict between the Third and the Seventh Circuits is "sufficiently crystalized to warrant certiorari if the federal law is to be maintained in any satisfactory, uniform condition." *Beaulieu v. U.S.*, 89-7175, 58 L.W. 3834 (1990) (certiorari denied) (White, J., dissenting).

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[10] The Seventh Circuit may have employed some kind of a sliding scale in order to conclude that the right asserted in this case is a harmless liberty as opposed to a fundamental right. That approach has been suggested by this Court in the First Amendment area where in *Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc.*, 472 U.S. 749 (1985), Justice Powell said "(w)e have long recognized that not all speech is of equal First Amendment importance." Justice Stevens has advocated this view, saying that child pornography, *New York v. Ferber*, 458 U.S. 747, 777 (1982), (Steven, J., concurring); "dirty words," *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); and adult movies, *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), occupy a lesser rank on the constitutional hierarchy of protected speech. The Seventh Circuit itself tried such an approach in *Miller v. School District #167*, 495 F.2d 658, 668 (7th Cir. 1974), where it held that the liberty exercised in the choice of style of appearance was "of such minor significance that 'the denial of public employment (on that

(Footnote 10 continued on Page 15)

2. The Decision Below Concluding That Speech by a Public Employee as a Citizen Outside the Employment Context and Unrelated to the Public Employment Must be on a Matter of Public Concern to be Protected Conflicts With The Tenth Circuit's Decision in *Flanagan v. Munger,* 890 F.2d 1557 (10th Cir. 1989).

This Court held in *Pickering v. Board of Education,* supra, 391 U.S. at 568 that in determining a public employee's rights of free speech, the problem is to arrive "at a balance between the interests of the (employee), as a citizen, in commenting on mat-

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(Footnote 10 continued)
basis) . . . does not in and of itself represent a deprivation that is forbidden by the Due Process Clause.' " The Seventh Circuit, however, appeared to withdraw that approach four years later in *Pence v. Rosenquist,* 573 F.2d 395 (7th Cir. 1978), holding that the discharge of the school bus driver for wearing a mustache did infringe his liberty protected by the Due Process Clause.

It has in other contexts been suggested that such as the right Petitioner in this case is claiming is fundamental is a so called lesser right. See for example, Craven, Jr. *Personhood: The Right to Be Let Alone,* 1976 Duke L.J. 699, 701. But why the right plaintiff is asserting in this case is or could be conceived as a lesser right is not clear. For example, in *Bolling v. Sharp,* 347 U.S. 497, 499-500 (1954), this Court said that the liberty protected by the Due Process Clause "extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Similarly, this Court said in *Board of Regents v. Roth,* 48 U.S. 564, 571 (1972), that the "broad and majestic" term "liberty" protected by the Fourteenth Amendment extended "to the whole domain of social and economic fact." Justice Cardozo, writing in the Paradoxes of Legal Science (Colum., 1928), said that "bills of rights give assurance to the individual of the preservation of liberty." *Id.* at 97. But, he said, "they do not define the liberty they promise." *Id.* Aside from the specific guarantees of freedom of speech, conscience, and religion, the liberties secured "are merely phases of a larger immunity which finds expression in the comprehensive declaration that no one shall be deprived of liberty without due process of law. *Id.* at 98. Ultimately, what that meant for Cardozo was what this Court had said in *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886), namely, "immunity against the 'play and action of purely personnel and arbitrary power.' " Cardozo, supra at 98-99.

ters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." See *Connick v. Myers,* 461 U.S. 138, 142 (1983). In *Connick v. Myers,* supra, this Court developed more fully the public concern threshold component of public employee speech and made clear that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personnel interest, absent the only unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency, allegedly in reaction to the employee's behavior" *Connick v. Myers,* supra, 461 U.S. at 147. This Court said that speech on a matter of public concern is that speech which "fairly considered . . . relat(es) to any matter of political, social, or other concern to the community. . .". *Id.* at 146.

But, this Court in *Connick* did indicate that it was not saying that a public employee's speech "even if not touching upon a matter of public concern (was) totally beyond the protection of the First Amendment." *Connick,* supra at 147. Instead, this Court said that

> (t)he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded' *Mine Workers v. Illinois Bar Assn.,* 389 U.S. 217, 223 (1967), quoting *Thomas v. Collins,* 323 U.S. 516, 531 (1945). We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction.

Connick at 147. See also *Rankin v. McPherson,* supra, 43 U.S. at 384 n. 7. This case directly presents the problem of a public employee speaking not as an employee but instead as a citizen on matters only of personal interest. It is, therefore, the obverse

of the situation presented in *Connick,* supra. The Seventh Circuit in this case concluded that that didn't make any difference and that the speech was protected only to the extent it was on a matter of public concern.

The Seventh Circuit based that conclusion not just on *Connick,* supra, but also on this Court's decision last term in *City of Dallas v. Stanglin,* ____ U.S. ____, 109 S.Ct. 1591, 1595 (1989), holding that the "kernel of expression" occurring "in almost every activity a person undertakes — for example, walking down the street, or meeting one's friends at a shopping mall — is not sufficient to bring the activity within the protection of the First Amendment. The court recognized that the speech in which Petitioner engaged was identifiable and articulable — college courses, the City of Carthage, motorcycles, and former boyfriends. App. at 5a. But, the court said the conversation "was too remote from the political rally, the press conference, the demonstration, the theater, or other familiar emporia of the marketplace of ideas to activate the guarantees of the First Amendment." *Id.*

The Tenth Circuit in *Flanagan v. Munger,* 890 F.2d 1557 (10th Cir. 1989), reached the opposite conclusion. *Flanagan* involved the off duty activity of several police officers engaged in a video business which as a small part of its operation, sold sexually explicit films. The plaintiff's speech activity in *Flanagan v. Munger* was the sale and renting of such videos.

In considering the threshold issue of whether or not the speech was protected as being on a matter of public concern, the Tenth Circuit said the problem presented was "factually and conceptually different from the typical *Pickering/Connick* fact pattern." 890 F.2d at 1562. The court said that "a typical *Pickering/Connick* case involves an employee who has been terminated or disciplined by a public employer for critical and allegedly disruptive comments made about work." *Id.* The court said that in *Flanagan v. Munger,* however, the situation

"involv(ed) 'speech' which is off the job and unrelated to any internal functioning of the department." *Id.*

The court in *Flanagan v. Munger* said that it did not believe that logically the *Pickering/Connick* public concern test lent itself to a situation "in which a public employee (1) engages in non-verbal protected expression which is (2) neither at work nor about work." *Flanagan v. Munger,* supra at 1562. The court said that "when a statement is made at or about work, use of the public concern test, indeed in narrow definition of public concern, makes sense." *Id.* at 1564. In that sense the court said "(t)he test helps define public concern in an area in which the critical distinction should be whether the speech at issue takes on significance outside the workplace or whether it deals primarily with an employee's personal employment problem." But, in a situation such as the one presented in *Flanagan v. Munger,* "the 'speech' already takes place outside the workplace and thus the purpose behind using the public concern test is simply irrelevant." *Id.*

The Tenth Circuit in *Flanagan v. Munger* relied to some extent on the Fourth Circuit's approach in *Berger v. Battaglia,* 779 F.2d 992 (4th Cir. 1985), where an off duty police officer had performed black face in a play which was offensive to certain members of the public and was disciplined. That court said that "*Pickering,* its antecedents, and its progeny — particularly *Connick* — make it plain that the 'public concern' . . . inquiry is better designed . . . to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limites on all that is." *Berger v. Battaglia,* 779 F.2d 992 at 998.

There is an additional aspect of the Seventh Circuit's resolution of this case. The court seemed to go beyond holding that the public concern test was applicable as a theshold for determining whether only public employee speech was protected. The court said flatly that "(t)he purpose of the free speech clause

and of its judge made corollary the right of association is to protect the marketplace in ideas (citing *Abrams v. United States,* 250 U.S. 616, 630 (Holmes, J., dissenting)), broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions — scientific, political or aesthetic — to an audience whom the speaker intends to inform, edify, or entertain." App. 4a. The court said that "(c)asual chit chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and is not protected." *Id.* Beyond the citation to Justice Holmes' dissent in *Abrams,* the Seventh Circuit offered no authority for that sweeping proposition.[11] It seems, as is suggested below, that that proposition is at variance with this Court's precedents.

Whether the decision of the Seventh Circuit in this case is conceived as eliminating all but speech on matters of public concern, whether engaged in by public employees or not, from First Amendment protection or whether it is conceived as applying rigorously the public concern test to speech by public employees as citizens unrelated to the public employment and outside the context of the public employment, it seems the decision in this

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[11] The court did refer to this Court's decision in *NAACP v. Alabama,* 357 U.S. 449, 460 (1958), for the proposition that the First Amendment protected association "for the advancement of beliefs and ideas." See App. 4a. That was the means by which the district court in this case disposed of the First Amendment issue raised by Petitioner. See App. 48a-49a. Cf. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 918-919 (1982), seeming to hold that the First Amendment prohibited state imposition of liability on an individual "solely because of his association with another." See also in this respect the Ninth Circuit's original opinion in *Benigni v. City of Hemet,* 853 F.2d 1519 (9th Cir. 1988), as first amended, 868 F.2d 307, and as finally amended, 879 F.2d 473, 476-477 (9th Cir. 1988), originally holding that social conversation in a tavern was protected speech and association and later questioning that result in light of *City of Dallas v. Stanglin,* supra. Compare also the Ninth Circuit's decision in *IDK, Inc. v. Clark County,* 836 F.2d 1185, 1192-96 (9th Cir. 1988).

case removes from First Amendment protection a wide range of articulable, expressive activity. The Seventh Circuit's direct conflict with the Tenth Circuit and to some extent the Fourth Circuit justify the grant of certiorari to review the judgment below.

B. The Decision Below Conflicts With This Court's Precedents Prescribing the Means by Which Rights Not Specified in the Text of The Bill of Rights are Determined to Be "Fundamental"

As noted, Blackstone recognized that the right of locomotion was "serv(ed) and preserv(ed)" by the English common law. Blackstone's Commentaries, published between 1765 and 1769, were very much a part of prerevolutionary and preconstitutional America. It is easy to understand, therefore, why those Commentaries are sometimes relied upon by this Court to inform as to those rights which are "deeply rooted in our nation's history and tradition," *Moore v. City of Cleveland,* 431 U.S. at 494, 503 (1977) (opinion of Powell, J.); *Michael H. v. Gerald D.,* ____ U.S. ____, 105 L.Ed.2d 106-107, 108 n. 6 (1989); *Cruzan v. Director, Missouri Dept. of Health,* ____ U.S. ____, 58 L.W. 4916, 4924 (1990) (Scalia, J., concurring). It is easy to understand why Blackstone is relied upon to advise as to those liberties which are established as "constitutional value(s) that reflect not the philosophical predilections of individual judges, but . . . basic choice(s) made by the people themselves in constituting their system of government. . .". *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 791 (1986) (White, J., dissenting).

Demonstrating the foregoing, Sir Edmund Burke said in a speech to the British Parliament on March 22, 1775, entitled "On Conciliation with the Colonies":

> Permit me, Sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so

> general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England.

Burke, Works: 464-71, quoted from 1 Kurland and Lerner, The Founders Constitution 4 (1987). In a similar vein, Thomas Cooley, writing the introduction to Cooley's Blackstone said:

> (i)t scarcely seems necessary to remark that the student of American law ought to be well grounded in English history, and to have studied the development of constitutional principles and the struggles and revolutions of the English people. It is idle to come to an examination of American Constitutions without some familiarity with that from which they have sprung, *and impossible to understand the full force and meaning of the maxims of personal liberty, which are so important a part of our law, without first learning how and why it was that they became incorporated in the legal system.*

1 Blackstone's Commentaries, supra, vii (Cooley Edition, 1899) (Introduction by Thomas Cooley) (emphasis supplied).

Dissenting in *Poe v. Ullman,* 367 U.S. 497, 540, Justice Harlan recognized that the rational process of constitutional adjudication was no where more apparent "than in giving meaning to the prohibitions of the Fourteenth Amendment and, where the federal government is involved, the Fifth Amendment, against the deprivation of life, liberty or property without due process of law." But, even as a rational process, he said,

"(d)ue process has not been reduced to any formula; its content cannot be determined by reference to any code." *Id.* at 542. Nor, he said, has ascertaining due process been a process "where judges have felt free to roam where unguided speculation might take them." *Id.* Rather, he said ascertaining due process "has represented the balance which our nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." *Id.* That balance "is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Id.* And, "(t)hat tradition is a living thing." *Id.* Therefore, Justice Harlan said, "(a) decision of this Court which radically departs from it could not long survive, while the decision which builds on what has survived is likely to be sound." *Id.*

Justice Harlan said that the "character" of the constitutional provisions "must be discerned from a particular provision's larger context." *Id.* at 542-543. Thus he said, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." *Id.* The "liberty" in question is thus "not a series of isolated points . . . (but rather) a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ". (citations omitted). *Id.*

Justice Harlan's *Poe v. Ullman,* supra, approach has found expression in his and Justice White's concurring opinions in *Griswold v. Connecticut,* supra; in Justice White's dissenting opinion in *Roe v. Wade,* supra; in Justice White's opinion for the court in *Bowers v. Hardwick,* supra; in Justice White's opinion dissenting in *Thornburgh v. American College of Obstetricians and Gynecologists,* supra; in Justice Scalia's opinion for the plurality in *Michael H. v. Gerald D.,* supra, and in Justice Scalia's opinion concurring in the judgment in *Cruzan v. Direc-*

tor, Missouri Dept. of Public Health, supra. It seems well suited to this case as the Third Circuit in *Lutz v. City of York Pa.,* supra, recognized this year.

Justices Stevens and Blackmun, concurring last term in *City of Dallas v. Stanglin,* ____ U.S. ____, 109 S.Ct. 1591 (1989), found the very right Petitioner is asserting in this case is at least an aspect of liberty protected by the Fourteenth Amendment:

> In my opinion, the opportunity to make friends and enjoy the company of other people — in a dance hall or elsewhere — is an aspect of liberty protected by the Fourteenth Amendment. For that reason, I believe the critical issue in this case involves substantive due process rather than the First Amendment right of association . . .

____ U.S. ____, 109 S.Ct. 1591, 1597 (1989), Stevens and Blackmun, J.J., concurring. It seems significant that Justice Stevens made that statement. As a member of the Seventh Circuit, Justice, then Judge Stevens wrote the opinion for the court in *Fitzgerald v. Porter Memorial Hospital,* 523 F.2d 716 (7th Cir. 1975). In *Fitzgerald,* the court upheld against a constitutional challenge, a hospital rule restricting presence in a delivery room of persons other than medical or obstetrical staff. The plaintiffs had asserted that their right of marital privacy was infringed. 523 F.2d at 719. In his opinion, then Judge Stevens noted the conceptual difficulty in asserting that as a "privacy" right arising under the "penumbra" of the various provisions of the bill of rights. *Id.* He indicated that all too often what were being asserted as "basic values" "dignified by history and tradition" were in fact no more than personal policy preferences of various individuals. *Id.* at 720-721.

In this vein, of course, then Judge Stevens was echoing the approach articulated by Justice Harlan in his dissent in *Poe v. Ullman,* supra. Therefore, when Justice Stevens, concurring in *City of Dallas v. Stanglin,* supra, was able to say that virtually the same right Petitioner is asserting in this case as a fundamen-

tal right is "an aspect of liberty protected by the Fourteenth Amendment," he was speaking through an analytic framework recognized by this Court that is wary of finding new rights outside the "language and design" of the Constitution.

The Seventh Circuit in this case found that the right Petitioner is asserting as fundamental to be a "harmless liberty" "sorted to the residual bin." App. 6a. It is not clear from where the Seventh Circuit derived that formulation. Nevertheless, it appears to be a formulation without explicit root anywhere in this Court's precedents. It further appears to be a formulation without contemplation anywhere in the language or design of the Constitution or otherwise sanctioned by our nation's history and traditions.[13] It is appropriate, therefore, that this Court review the judgment of the Seventh Circuit in this case.

C. The Decision Below Conflicts With This Court's Precedents Affording First Amendment Protection to Identifiable and Articulable Speech Irrespective of its Social Worth or Public Importance, *City of Dallas v. Stanglin*, ____ U.S. ____, 109 S.Ct. 1591 (1989, Notwithstanding

In *City of Dallas v. Stanglin*, ____ U.S. ____, 109 S.Ct. 1591 (1989), this Court upheld against a facial challenge, a Dallas city ordinance designed to protect young teenagers by creating a special dance hall lice[illegible] restricted to 14 to 18 years old. The Court said that "the activity of these dance hall patrons — coming together to engage in recreational dancing — is not protected by the First Amendment." ____ U.S. ____, ____, 109 S.Ct. 1591, 1595. Beyond that the Court said that it was possi-

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[13] An argument can be made that the Ninth Amendment precludes the "harmless liberty" formulation stated by the Seventh Circuit. See for e.g. Caplan *The History and Meaning of the Ninth Amendment*, 69 Va.L.Rev. 223 (1983).

ble to find "some kernel of expression in almost every activity a person undertakes . . . but such kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* The Court did not cite any authority or otherwise provide indication as to what was included and what was not included within the "kernel of expression" exemption from First Amendment protection. Importantly, what the Court was dealing with in *City of Dallas v. Stanglin,* supra, was a legislative scheme designed to protect younger teenagers from the supposed corrupting influences of older people. Also importantly, there was no identifiable or articulable expressive activity which came within the prohibition of the ordinance. Therefore, the focus of the activity subject to the legislative prohibition in *Stanglin* had nothing whatsoever to do with expression.

But, that is not true in this case. The activity engaged in by Petitioner had two components: first the motorcycle ride and second the conversation which transpired while on the motorcycle ride. The conversation, in turn, was specifically identifiable as bearing upon Tina Millin's course work at college, how she like the town of Carthage, motorcycles, and her former boyfriend. Nevertheless, the Seventh Circuit in this case was, on the authority of *City of Dallas v. Stanglin,* supra, able to say that that conversation was no more than "chit chat," App. 6a, and thereby subject to the "kernel of expression" exemption from First Amendment protection.

It is respectfully submitted that that analysis by the Seventh Circuit is at variance with this Court's precedents bearing upon the scope of First Amendment protection. The Seventh Circuit's holding and analysis place at great risk a significant amount of expressive activity engaged in by human beings in this society. This Court has never given sanction to the Seventh Circuit's approach.

For example, in *Winters v. New York,* 338 U.S. 507 (1948), a freedom of the press case, this Court said that it did not accept

> Appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between informing and entertaining is too elusive for the protection of that basic right . . . *Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of the First Amendment as the best literature.*

Winters, supra at 510. (emphasis supplied) This Court said the same thing in *Mine Workers v. Illinois State Bar Assn.,* 398 U.S. 217, 223 (1967). It said the same thing in *Thomas v. Collins,* 323 U.S. 516, 531 (1945). It said the same thing in both *Connick v. Myers,* supra at 147 and *Rankin v. McPherson,* 483 U.S. 378, 384 n. 7 (1987). Furthermore, the same analysis applied by this Court in *Winters v. New York,* supra, certainly would apply to the Tenth Circuit's decision in *Flanagan v. Munger,* supra, affording First Amendment protection to the non-verbal sale and rental of sexually explicit video tapes.[13] By the Tenth Circuit's approach in *Flanagan v. Munger,* supra, the non-verbal sale and rental of sexually explicit video tapes achieved greater First Amendment protection than Petitioner's "chit chat" concerning Tina Millin's college course work, how she liked the City of Carthage, motorcycles and her former boyfriend. That is an incongruous result.

In *Cox v. Louisiana,* 379 U.S. 536, 581 (1965), Justice Black, concurring, said

> by specifically permitting picketing for the publication of labor union views (but prohibiting other sorts of picketing), Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It is thus trying to prescribe by law what matters of public interest people whom it allows to assemble on its

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[13] So might the "sliding scale" approach utilized by this Court in various First Amendment decisions. See footnote 10, supra.

> streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments.

In *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 98 (1972), this Court specifically adopted Justice Black's concurring opinion in *Cox*, supra. In so doing, the Court said that under the First Amendment

> Government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial views. *And it may not select which issues are worth discussing or debating. . . .*

Police Dept. of Chicago v. Mosley, 408 U.S. at 96 (emphasis supplied).

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court considered the associational rights under the First Amendment of the United States Jaycees in relation to a Minnesota statute prohibiting sex discrimination in places of public accommodation. In so doing, the Court distinguished between "expressive" and "intimate" association, the latter "characterized by deep attachments . . . (and) the distinctively personal aspects of one's life." *Id.* at 620.[14]

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[14] The *Roberts v. United States Jaycees*, supra, construct of expressive association at one end of a continuum of human activity and intimate association at the other end of the same continuum leaves a wide range of human activity in the middle. As observed by the Third Circuit in *Lutz v. City of York, Pa.*, 899 F.2d at 267, "modern substantive due process cases almost all cluster around decisions involving family matters or procreative decisions." Compare the Ninth Circuit's protection of private and off duty police intimacy in *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), with *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1500 (9th Cir. 1987), and *Fugate v. Phoenix Civil Service Board*, 791 F.2d 736 (9th Cir. 1986), and the Eighth Circuit's decision in *Fisher v. Snyder*, 476 F.2d 375 (8th Cir.

(Footnote 14 continued on Page 28)

The right of "expressive association" this Court found to be necessary to "an individual's freedom to speak, to worship, and to petition the government for the redress of grievances. . .". *Roberts,* 468 U.S. 622. On that basis, this Court said that it had "long understood as implicit in the right to engage in activities protected by the First Amendment *a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.*" *Id.* (emphasis supplied.)

In the wake of *Roberts,* the right of expressive association is an "instrumental" right, constitutionally protected as a means of securing the specific freedoms guaranteed by the First Amendment. See Note, *The Supreme Court, 1983 Term,* 98 Harv.L.Rev. 87, 199 (1984). Thus, the right of freedom of association as an instrument for the furthering of the specific First Amendment freedoms must, as a matter of logic, be considered to be co-extensive with the underlying First Amendment freedom for which it is the instrument. This Court in *Roberts* so said when it held that the association right "correspond(ed)" "to the right to engage in activities protected by the First Amendment." *Roberts,* supra at 622.

Therefore, to the extent Petitioner has a right to engage in what the Seventh Circuit characterized as "chit chat" but which

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(Footnote 14 continued)
1973), protecting association of a teacher off duty with member of opposite sex in small Nebraska town. The *Lutz* court observed that the right to travel intrastate did not comfortably fit within that range of decisions. Neither does Petitioner's activity in this case. Ironically, the Respondents seemed to argue in the court below that if Petitioner had been embarked on a "sexual liaison" or a "dating situation or in an attempt to make her acquaintance for purposes of social followup," (Municipal Respondents' brief, p. 20) — the very things which Respondent Chief erroneously feared — Petitioner's conduct might have been protected as intimate association under *Roberts v. U.S. Jaycees,* supra. By the same token, had Petitioner been taking Tina Millin on his motorcycle to a meeting of the Young Communist League, or Hitler Youth, his conduct likewise might have been protected under the Seventh Circuit's conception of the *Roberts v. U.S. Jaycees* expressive association framework.

nevertheless bore upon specifically articulable topics, so should he have had a corresponding right to associate with Tina Millin for that purpose. But, if even clearly identifiable and articulable "chit chat" is not protected, association which facilitates that "chit chat" is probably not protected.[13]

Has it come to pass that the First Amendment, in the wake of *City of Dallas v. Stanglin,* supra, has become so rarefied in its reach that it does not protect that which is the daily conversational fare of most human beings? No decision of this Court prior to *Stanglin,* supra had intimated anything like that doctrine. All decisions were to the contrary. Indeed, as suggested by such decisions as *Police Dept. of Chicago v. Mosley,* supra, it is simply not the business of a court when considering First Amendment freedoms to attempt to assess the social worthwhileness of the speech or expression in question. It seems fair to say that if the courts ever did venture into that thicket, it would make the attempt to determine what is or is not obscenity seem

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[13] On that basis, the Seventh Circuit observed that the Eleventh Circuit's decision in *Wilson v. Taylor,* 733 F.2d 1539, 1543-1544 (11th Cir. 1984), protecting on First Amendment association and Fourteenth Amendment substantive due process grounds an off duty dating relationship between a policeman and the daughter of an alleged mobster probably did not survive this Court's decision in *Roberts v. U.S. Jaycees,* supra. To the contrary, the Tenth Circuit in *Flanagan v. Munger,* supra, 890 F.2d at 1564 n. 7 did not seem to regard *Wilson v. Taylor* as in a state of demise. Cf. *Sawyer v. Sandstrom,* 615 F.2d 311 (5th Cir. 1980) and *McKenna v. Peekskill Housing Authority,* 497 F.Supp. 1217 (S.D.N.Y. 1980), as modified 647 F.2d 332 (2d Cir. 1981), both cases holding that the First Amendment freedom of association extended to social and personal relationships which did not purport to express and advocate ideas. In its original opinion in *Benigni v. City of Hemet,* 853 F.2d 1519, 1522, discussed supra, n. 11, the Ninth Circuit based its conclusion that social conversation in a tavern was protected expressive association on *Roberts v. U.S. Jaycees,* supra, prior to questioning that result as it finally amended its opinion, 879 F.2d 473, 476-477, in light of *City of Dallas v. Stanglin,* supra.

like an exercise in something admitting of mathematical precision. The decision of the Seventh Circuit in this case pointing the direction into that thicket should, therefore, be reviewed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1360

Gary D. Swank,
Plaintiff-Appellant,

v.

James Smart, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 86 C 1306—**Michael M. Mihm,** *Judge.*

Argued November 2, 1989—Decided March 27, 1990

Before Cudahy, Posner, and Manion, *Circuit Judges.*

Posner, *Circuit Judge.* A policeman brought this civil rights suit against a small town in western Illinois that fired him for conduct unbecoming an officer, and against the officials actually responsible for the firing. 42 U.S.C. § 1983. The district judge granted summary judgment on his own initiative and dismissed the case.

Tina Millin was a 17-year-old student at the Robert Morris College in Carthage. Gary Swank was a member of the town's three-man police force. On September 24, 1986, after supping

at McDonald's with his wife, Swank, who was off duty, mounted his motorcycle and rode off to look for a friend who worked the night shift in the sheriff's office. He could not find him and rode around looking. His quest took him several times through an intersection where two teenage girls, whom he did not know, waved at him. On his fourth pass through the intersection Swank stopped, flagged down by one of the girls. This was Tina, who was attracted by the "cute little elephant on his bike," and whose former boyfriend had taken her for rides on *his* motorcycle. After chatting with the two girls for a while, Swank took Tina for a ride on his motorcycle. The ride, which began sometime between 12:30 and 1:30 a.m., lasted twenty or thirty minutes. The riders discussed Tina's courses at the college, the motorcycle, her former boyfriend, her opinion of Carthage, and similar topics. At the end of the ride, Swank deposited Tina at the intersection where he had found her and where the other girl was still waiting.

Another Carthage policeman saw Swank and Tina Millin riding on the motorcycle and he reported what he had seen to the chief of police. Swank was already on probation with the department for various deficiencies in the performance of his duties. To his chief, the late-night ride with a teenage girl—who turned out to be a student of the college—was the last straw. The chief prepared a list of charges to present to the Public Safety Committee of the City Council at its meeting on the evening of October 6. At 2:00 a.m. on the day of the meeting, he obtained a statement from Tina concerning the ride. He mentioned the statement to the members of the committee, but they didn't want to read it because, in the words of the mayor, who was the committee's chairman, "they didn't want to know all the gory details."

The list of charges, which the chief read aloud at the meeting, recounted the motorcycle incident and added that Swank had lied when confronted with it. Swank, who was present by invitation, was asked to respond to the charges, and he did. He

denied that he had lied to the chief about the incident but admitted that the incident had occurred. He emphatically denied any romantic or sexual angle. After Swank had responded to the charges, the chief gave the committee members a brief written statement that the chief had prepared. It stated that the Carthage police had to have the complete confidence of the college and its students and that the motorcycle ride had "tarnished" the police force's (collective) badge.

The chief and Swank were then excused, and the committee deliberated. At the conclusion of its deliberations, it voted to suspend Swank until the next meeting of the City Council, which took place on October 14. Swank was not present at that meeting. The chairman of the Public Safety Committee (the mayor) presented the matter to the council, noted the police chief's belief that Swank had exhibited "conduct unbecoming a police officer," and finished by telling the council that the committee recommended that Swank be fired. The council then voted four to three to fire him, on the ground that the motorcycle incident "was his third write up [and] the incident [was] damaging the good relationship the city police and the city had with the college students and personnel." The complaint in this lawsuit alleges that the defendants revealed to the local press the ground for firing Swank. The firing received some coverage in local newspapers, and one of the articles did mention that the ground was conduct unbecoming an officer. Since being fired, Swank has been unable to obtain another job as a policeman. And the Robert Morris College has closed its Carthage campus.

Swank contends that his dismissal from the Carthage police force deprived him of his constitutional rights to freedom of speech, freedom of locomotion, and freedom of association, and also deprived him of his property right and liberty interest in his job (for, despite being "on probation," he was a tenured rather than probationary civil servant when fired) without due process of law. The appeal emphasizes, mistakenly as it seems to us, the deprivation of Swank's substantive rights—aspects of

liberty that, he contends, the due process clause of the Fourteenth Amendment secures to him unless the state can demonstrate an overriding public purpose in restricting them—rather than his right not to be deprived of his job without minimum procedural safeguards.

The free-speech claim is quickly dispatched. The conversation between Swank and Tina on the motorcycle was speech in the literal sense, but not speech protected by the free-speech clause of the First Amendment (made applicable to the states and their subdivisions via the Fourteenth Amendment by *Gitlow v. New York*, 268 U.S. 652, 666 (1925)). It was also association in the literal sense, but not association "for the advancement of beliefs and ideas." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The purpose of the right of association is to protect the market in ideas, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and is not protected. Such conversation is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment.

The distinction is sharply—perhaps too sharply—drawn in cases in which public employees are fired because of something they said. They have no First Amendment claim unless they were speaking on matters of "public concern." *Connick v. Myers*, 461 U.S. 138, 142-49 (1983); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1301-03 (7th Cir. 1990). Maybe, as the Tenth Circuit suggested in *Flanagan v. Munger*, 890 F.2d 1557, 1563-65 (1989), the purpose of the "public concern" requirement is to distinguish grievances of an entirely personal

character from statements of broader interest concerning one's job, rather than to fix the boundaries of the First Amendment. That refinement is not important in this case. Whatever the exact boundaries, constitutionally protected expression is not the totality of expression. That "kernel of expression" which can be found "in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall . . . is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin,* 109 S. Ct. 1591, 1595 (1989).

Discussion of college courses, of college itself, of Carthage (whether that "cauldron of unholy loves" of which St. Augustine speaks in the *Confessions,* or its Illinois namesake, where Joseph Smith, the founder of the Mormon religion, was lynched)—even discussion of motorcycles and former boyfriends—can contribute to the marketplace of ideas. But not in this case. The conversation that took place between Gary Swank and Tina Millin on the motorcycle ride, a conversation idle or flirtatious in character, was too remote from the political rally, the press conference, the demonstration, the theater, or other familiar emporia of the marketplace of ideas to activate the guarantees of the First Amendment.

Yet because chit-chat is important to the participants, although not to the community when conceived of as more than the sum of its members, the freedom to engage in it is an aspect of the liberty protected by the due process clause, along with the freedom to exercise other harmless liberties illustrated by *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243, 1247 (9th Cir. 1982). A law that enjoined silence on all persons not participating in the marketplace of ideas, a law that forbade people to go from one place to another within the same state (and so extinguished the "right of locomotion," as distinct from the right to travel interstate, *Williams v. Fears,* 179 U.S. 270, 274 (1900)), a law that forbade dating or, for that matter, forbade an off-duty policeman to offer a ride on his motorcycle

to a coed—all of these hypothetical laws would infringe liberty. If arbitrary, they would be deemed to violate "substantive due process," the term for the protection that the due process clause has been held to extend to substantive rights not listed in the Bill of Rights. Some of these nonenumerated substantive liberties receive broader protection (broader, that is, than protection merely against *arbitrary* deprivations) under such rubrics as "right of privacy," "fundamental right," and "right of association" in a nonexpressive sense. *Roberts v. United States Jaycees,* 468 U.S. 609, 617-20 (1984). And sometimes these "fundamental rights" pop up in the employment setting, cf. *Shondel v. McDermott,* 775 F.2d 859, 865-66 (7th Cir. 1985), and when they do it is sometimes suggested—erroneously, in light of *Roberts* and *Stanglin*—that the First Amendment protects nonexpressive associations. The principal case is *Wilson v. Taylor,* 733 F.2d 1539, 1542-44 (11th Cir. 1984), which concerns a policeman's dating a felon's daughter. *Wilson* was decided three weeks before *Roberts,* and did not survive it. *IDK, Inc. v. Clark County,* 836 F.2d 1185, 1192-96 (9th Cir. 1988); *Fleisher v. City of Signal Hill,* 829 F.2d 1491, 1500 (9th Cir. 1987).

No more than the First Amendment are any fundamental rights involved in this case. Swank himself is for obvious reasons emphatic that his encounter with Tina, like the encounters with strangers in a dance hall in *Stanglin,* was not an intimate association—the kind of association to which a specially protected constitutional right of privacy might attach. Instead it is sorted to the residual bin, what we are calling the "harmless liberties," the liberties that are protected only against *arbitrary* infringements.

The limitation is vital. The concept of "ordered liberty" (*Palko v. Connecticut,* 302 U.S. 319, 324-25 (1937) (Cardozo, J.); *Adamson v. California,* 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring)) that many judges have found implicit in the due proces clause may forbid arbitrary restrictions on personal liberty, broadly defined, but federal courts cannot

undertake in the name of the Constitution to regulate minutely every restriction that public employers place on their employees. *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976); *Patterson v. Portch*, 853 F.2d 1399, 1405 (7th Cir. 1988). The Constitution is not an employment manual. True, it has been interpreted to confer *procedural* protection on *tenured* employees; but if Swank's submission is correct, it also confers a broad range of ill-defined *substantive* rights, and confers them irrespective of tenure. If his submission is correct Carthage could no more discipline an at-will employee for flexing his liberties of locomotion, association, and social conversation in the manner in which Swank flexed these liberties when he gave Tina a ride than it could discipline a tenured employee such as Swank himself. Tenure is relevant to Swank's "procedural due process" claim—that he was deprived of his tenured position without adequate procedural safeguards against erroneous deprivation—but not to his substantive due process claims.

A restriction on a form of liberty not explicitly codified in the Bill of Rights or singled out by the courts for special protection under such rubrics as "right to privacy" and "fundamental rights" violates the due process clause only if utterly unreasonable—that is what "arbitrary" means in this setting—and it is less likely to be found so if it is a regulation of public employees than if it is a regulation of private citizens. *Kelley v. Johnson*, 425 U.S. 238, 248-49 (1976). The police can prohibit its officers from wearing their hair long. *Id.* at 247-48; *Shawgo v. Spradlin*, 701 F.2d 470, 483 (5th Cir. 1983). We expect it could not prohibit private persons from wearing their hair long unless they were prisoners, *Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988), or some other exceptional circumstance were shown.

Sometimes public employers go too far, and are held to deny their employees substantive due process; our favorite example is the school bus driver fired for wearing a mustache. *Pence v. Rosenquist*, 573 F.2d 395 (7th Cir. 1978). The freedom to grow

or shave a mustache is not the loftiest component of personal liberty, but unless substantive due process is discarded as a constitutional doctrine, infringements of that freedom will not be allowed unless there is some attempt at justification. Closer to the present case, however, are cases in which the firing of a public employee suspected of departing from a code of sexual propriety no longer widely observed in this country has been held to deny the employee substantive due process. But these cases are based on the right of privacy, as in *Thorne v. City of El Segundo,* 726 F.2d 459,468-71 (9th Cir. 1983), and have been interpreted narrowly. *Fleisher v. City of Signal Hill, supra; Fugate v. Phoenix Civil Service Bd.,* 791 F.2d 736 (9th Cir. 1986).

This is not a right of privacy case. It is not a freedom of speech case. In other words it is a case neither about freedom of intimate association nor about freedom of expressive association. The legal test therefore is sheer unreasonablenss and we cannot say that Carthage's decision to regard *l'affaire* Tina as conduct unbecoming a police officer flunks it. The college authorities and the students' parents deprecate intrigues between students and married police officers, and while Swank's brief relationship with Tina Millin was not that, the appearance of impropriety was there—in a married man's giving a teenage girl whom he had never met before a motorcycle ride late at night—and the judgment displayed by Swank poor. Or so at least the town could conlcude without taking such leave of its senses as would convict it of a denial of substantive due process. The defendants may have overreacted by firing Swank for an incident that seems trivial by itself; but remember that it was his third strike, so it is no surprise that he was called out. The action of the police in picking up Tina at 2:00 a.m. to get her statement could of course be thought to bespeak an insensitivity no less than Swank's to appearances of impropriety. But Swank's counsel failed to develop the facts bearing on the incident.

So much for substantive rights. As a tenured employee Swank had certain procedural rights that he claims the defendants also infringed. He will not be heard to argue that he was denied fair notice because the regulations governing the conduct of Carthage police officers failed to specify late-night off-duty motorcycle rides for college students of the opposite sex as grounds for discharge. The duty of fair notice does not require such extraordinary and particularized foresight of the specific manner in which an officer might display poor judgment meriting severe discipline. Vague, catch-all standards for discipline do not violate due process. *Brasslett v. Cota*, 761 F.2d 827, 838 (1st Cir. 1985). But Swank was entitled to notice of the charges against him and an opportunity to answer them.

He was given an opportunity to answer the formal charges that the police chief read to the Public Safety Committee, but no opportunity to respond to the written statement that the chief submitted to the committee just before he and Swank were excused, evaluating the effect of Swank's conduct on the police department and on the town. If that statement were properly characterized as a list of additional charges, Swank would clearly have been denied due process. It is not that. The statement did not charge Swank with any misconduct not encompassed by the seven charges that the police chief read aloud. It was the chief's assessment of the harm that the misconduct had caused. It was evidence rather than pleading—but it was relevant, and indeed highly material, evidence. So while there is no problem of insufficient notice of the charges, there is a serious problem of the adequacy of the hearing. The harm caused by the Tina incident apparently influenced the Committee's decision on how severe a sanction to impose on Swank, for in justifying its decision to fire Swank rather than impose some lesser sanction the Committee mentioned the threat posed by the motorcycle incident to the police department's relations with the college—the police chief's point exactly.

Suppose Swank had been charged with firing his gun without good cause, and had been allowed to answer the charge; and when he had finished answering, the chief told the committee "and by the way the president of Robert Morris College was killed." This would be a material aspect of the charge and Swank would be entitled to challenge it. Similarly we think he was entitled to challenge the chief's assessment of the damage caused by the Tina incident. Ex parte presentation of evidence denies due process, *Greene v. McElroy,* 360 U.S. 474, 496-97 (1959), with exceptions—for example, in some prison-discipline cases, *McCollum v. Miller,* 695 F.2d 1044, 1049 (7th Cir. 1982), and in other limited settings where evidence in introduced *in camera, Jay v. Boyd,* 351 U.S. 345 (1956)—that are not pertinent to this case.

An alternative characterization may seem possible: that the chief was offering not evidence but argument. That would be a proper characterization if he had been commenting on town-gown relations in general. But he was commenting on relations between the college and the police department in particular. He was offering in effect an expert's opinion, and that is evidence which Swank was entitled to an opportunity to rebut. The chief himself, in his deposition, described the statement (by which we mean the part that was not shown Swank) as "reflect[ing] my opinion that [Swank] has done damage to our professional image." The brief for the individual defendants (including the chief) describes the statement similarly, as "Smart's conclusion as to the effect" of the alleged misconduct. The district judge construed it the same way. Most important, the City Council based its conclusion that there was just cause to fire Swank in part on "the [Tina] incident damaging the good relationship the City Police and City had with the college students and college personnel." This finding was based in turn on the chief's statement.

In any event, while not even a criminal defendant has a constitutional right to argue last, a prosecutor (as—to continue the

criminal analogy—the police chief was in this disciplinary matter) is no more entitled to make ex parte arguments to the tribunal than to present ex parte evidence or to press charges of which the accused has no notice. In the argument to this court, for example, Swank's counsel addressed the court last, in his rebuttal argument; it would have been an extraordinary impropriety if he had delivered his rebuttal argument to us in the privacy of our chambers with the defendants' counsel not present.

The failure to show Tina's statement to Swank and allow him to comment on it was a separate infringement of his right to a fair hearing even though—in fact, because—it was not shown to the members of the Public Safety Committee either. The problem is not as it might seem to be that Tina was driven to the police station at 2:00 a.m. to give her statement. Swank does not contend that there was any coercion or other impropriety involved in obtaining Tina's statement; and if there were, so what? Provided the statement was not used against Swank at the hearing, the proper analogy would be to the coercive extraction of a confession not used at the defendant's trial.

Our point, therefore, is not that Swank was denied the opportunity to challenge a statement that was actually introduced into evidence against him. Nor is it even that he was denied the opportunity to use an exculpatory statement. We are not suggesting that due process in employee discharge cases includes a right to prehearing discovery, or that the principle of *Brady v. Maryland,* 373 U.S. 83 (1963), which requires the prosecution in a criminal case to provide exculpatory materials in its possession to the defendant upon request, is applicable to employee discharge cases. The point is different. It is that although Tina's statement was not read by the members of the committee, it was *used* by them; effectively it was in evidence.

The committee members had formed the idea that there had been hanky-pank between Swank and Tina and assumed there-

fore that the statement contained "gory details." As the mayor elaborated, "I just didn't feel like it would have been in good taste for myself or the safety committee to go over it because it's a small town and I am sure somebody would divulge the information." In fact there was no information to divulge, or at least—the critical point—much less than the mayor and the other members of the committee believed. Nothing had happened between Swank and Tina. Well, almost nothing. She had asked him whether he was married, and (according to her statement) "his exact words were 'Who wants to be married.' I thought, 'Oh, O.K.' So I just thought he wasn't and I looked for a wedding band on his finger and he didn't have one on." When she learned he was married, she was "kinda hurt, I guess. I felt like I had been taken advantage of. I thought he was terrible for doing what he'd done, instead of staying home with his wife." Nevertheless she was emphatic that "no physical stuff, alcohol, or other drugs [had been] involved in the encounter with Gary," that they had not talked about seeing each other again, and that they had not in fact seen each other again. And while she had concluded that Swank was "the 'rotten apple' in the police department," she didn't "blame the whole police department." Swank could have used Tina's statement—a statement that having been extracted by his nemesis, the police chief, would have been more credible than Swank's own statement—to argue not only that his encounter with her had been innocent, but also that it had not tarnished the police department's collective badge: the rotten apple hadn't spoiled the entire barrel.

It is true that the chief never argued to the Committee that there was a sexual or romantic relationship between Swank and Tina. He didn't have to, for apparently the Committee assumed there was. Swank was entitled to an opportunity to still their suspicions by revealing the actual contents of Tina's statement. True, the statement was not entirely favorable to him; the Committee might have picked out the attempt by Swank to conceal his marriage and used it as additional evidence against him. If

shown the statement, he might have found it embarrassing and made no use of it at all. But it was potentially critical evidence that he was entitled to see; the withholding of it from him may well have resulted in the Committee's thinking worse of him than the facts justified.

The case would stand differently if the committee had not learned of the statement's existence. For then the statement could not have harmed Swank—could not have been a kind of evidence against him although not actually shown to the committee members. The question would have been whether the chief of police, corresponding to the prosecutor in a civil case, had a *Brady*esque duty to disclose exculpatory materials to Swank if Swank requested them. We may assume that the answer is no, since the procedural safeguards due a person facing loss of a tenured job are more modest than those due a person facing criminal punishment. But this is not a *Brady* case. The committee knew about Tina's statement and from this knowledge conjectured "gory details" that strengthened the inference that Swank had been (1) guilty of (2) serious misconduct. For it seemed that the chief had proof, and that the proof was dynamite. Without being placed in evidence—indeed, *because* it was not placed in evidence—Tina's statement was the most damaging piece of evidence against Swank. He had a right to see and use it in his defense.

There is an analogy to the principle of the law of fraud that silence can, in some circumstances, mislead. The mayor told the chief that he did not want to see the gory details. The chief could have said, "There are no gory details." He did not. He kept mum. His silence was implicit agreement with the mayor's characterization. It reinforced the mayor's suspicions.

The modest additional procedural safeguards that we believe Swank was entitled to would not have been burdensome for the town of Carthage, small and unlawyered as it is, yet would have contributed substantially to the making of a rational decision

affecting a person's livelihood. They were therefore required by the "sliding scale" approach that the Supreme Court has prescribed for evaluating procedural claims. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976); *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 261-62 (1987); *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 543-46 (1985); *Sutton v. City of Milwaukee,* 672 F.2d 644 (7th Cir. 1982); *Fleury v. Clayton,* 847 F.2d 1229, 1231-32 (7th Cir. 1988). Whether constitutionally adequate procedures would have changed the outcome is of course disputable and disputed, but that issue goes to damages rather than to liability. *Carey v. Piphus,* 435 U.S. 247 (1978); *Laje v. R.E. Thomason General Hospital,* 665 F.2d 724, 728-29 (5th Cir. 1982).

If there were no dispute about the procedural rights that were offered to Swank, we could grant him summary judgment on liability. There is no dispute about the rights that were offered him at the hearing before the Public Safety Committee. But there is a dispute over whether he was offered a further hearing. The town might well have gotten away with as little procedure as it gave Swank at the hearing before the committee if it had offered him a post-termination hearing. *Powell v. Mikulecky,* 891 F.2d 1454 (10th Cir. 1989); *Riggins v. Board of Regents,* 790 F.2d 707 (8th Cir. 1986); *Brasslett v. Cota, supra,* 761 F.2d at 832-38. A public agency can fire an employee on the basis of notice (which there was here) and a probable-cause hearing, provided it offers him a full hearing afterward. *Cleveland Bd. of Education v. Loudermill, supra,* 470 U.S. at 545-46; *Brock v. Roadway Express, Inc., supra,* 481 U.S. at 261-62. Only if there is no provision for a post-termination hearing must the pre-termination hearing provide all the procedural safeguards to which due process entitles a tenured public employee. A *fortiori,* a first hearing need not provide a full set of procedural safeguards if there is a chance for a second hearing before termination. Whether there was such a chance or not here is disputed. According to the defendants' depositions, after the initial hearing—the hearing before the Public Safety Commit-

tee—Swank asked whether there would be another hearing and the defendants told him that one would be arranged if he wanted but reminded him that he had already had a hearing, in the meeting of the committee—to which Swank replied that he guessed he had and anyway he wasn't going to sue. But according to Swank's deposition, he asked the mayor whether he was entitled to a hearing and was told, "There's your hearing"—referring to the truncated proceeding before the committee. If Swank is believed, he had no opportunity for a further hearing; if the defendants are believed, he had the right to a further hearing but waived it. This is a genuine issue of material fact; it cannot be resolved on summary judgment.

Before deciding what our disposition of the procedural due process issue should be, however, we must consider whether the individual defendants are immune from liability for the alleged violation of Swank's procedural rights. The test is whether the grounds for liability were clearly established at the time of the violations. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). It was as well established in 1986 as it is today that a tenured public employee has a constitutional entitlement to a fair hearing before being fired and that with immaterial exceptions a fair hearing includes the right to be shown the evidence on which the tribunal has relied, *Goss v. Lopez,* 419 U.S. 565, 581 (1975); *Morrissey v. Brewer,* 408 U.S. 471, 487-89 (1972); 2 Davis, Administrative Law Treatise § 13:11, at p. 508 (1979), including evidence pertaining to the gravity of the sanction to be imposed when liability is conceded. *Morrissey v. Brewer, supra,* 408 U.S. at 488; cf. *In re Grand Jury Proceedings,* 894 F.2d 881, 885 (7th Cir. 1990). This specific constituent, at least, of a fair hearing was well established in 1986, as it has to have been for its denial to elude the immunity defense. *Anderson v. Creighton,* 483 U.S. 635 (1987); *Azeez v. Fairman,* 795 F.2d 1296, 1301 (7th Cir. 1986); *Colaizzi v. Walker,* 812 F.2d 304 (7th Cir. 1987). The only possible doubt about the police chief's statement is whether it should be characterized as a pleading, as evidence

(which we think is the correct characterization), or as argument; but however it is characterized, the presentation of it in secret to the decision-making tribunal violated a specific procedural entitlement clearly established at the time of the violation. It makes no difference that there has never been a case with facts identical to this one. *Landstrom v. Illinois Department of Children & Family Services,* 892 F.2d 670, 676-78 (7th Cir. 1990), and cases cited there.

In contrast, our characterization of Tina's statement as evidence rather than undisclosed exculpatory material is a novelty of this opinion. Current immunity doctrine requires clear notice to public officials that their conduct violates the Constitution. The notice can of course be given by decisions interpreting the Constitution, but the interpretations must be specific, not general. No decisions placed these defendants on specific notice that their conduct of the hearing denied Swank his constitutional rights. This conclusion requires the dismissal of so much of the case against the individual defendants as concerns Tina's statement, but leaves Carthage's liability unaffected. It is undisputed that the discharge of Swank occurred at the policy-making level of town government.

Swank's remaining argument is that the ground for his dismissal-conduct unbecoming a police officer—coupled with public dissemination of the ground, has prevented him from obtaining another job as a policeman and by doing so has infringed his liberty of occupation. The argument may seem to add nothing to Swank's case, since he was a tenured employee. Such an employee is entitled to notice and hearing before being fired, whatever the ground on which he is fired. The liberty of occupation cases entitle a nontenured employee to a fair hearing if but only if he was fired on a ground that impairs his ability to obtain comparable work in the future. *Lawson v. Sheriff of Tippecanoe County,* 725 F.2d 1136 (7th Cir. 1984). The hearing that is adequate for one is adequate for the other.

Or is it? It could be argued that because a stigmatizing dismissal has graver consequences for the employee than a nonstigmatizing one, a more elaborate procedure should be required. This argument would be consistent with the "sliding scale" approach that the Supreme Court adopted in *Mathews v. Eldridge,* and with common sense. A defendant in a capital case is entitled to more procedure than a defendant in a parking-ticket case. If Swank was fired on a ground likely to exclude him from his occupation, he was exposed to a more severe punishment than if he merely lost a position with one employer. Maybe therefore he was entitled to more procedural safeguards than he received. The point will be academic if it turns out on remand that Swank was denied even those possibly less elaborate procedural rights to which he was entitled as a tenured employee regardless of the ground on which he was dismissed. Actually, it is academic now, because it has never been raised. We add for completeness that the point would not help Swank over the immunity hurdle. The entitlement of a liberty-of-occupation plaintiff to more procedural rights than an ordinary tenured employee has is even more novel than the entitlement of that employee to the procedural safeguards that the defendants omitted in this case. Novel entitlements no longer ground damages liability against individuals charged with constitutional torts. But again the liability of the town would be unaffected.

The liberty of occupation argument is not completely moot, however, because it could affect the amount of damages. Even when a plaintiff succeeds in demonstrating a violation of his procedural rights, he often has difficulty proving more than nominal damages. To get damages that will compensate for the loss of the job itself he must prove that if only he had received his procedural rights he would not have been fired. *Lossman v. Pekarske,* 707 F.2d 288, 290-91 (7th Cir. 1983). (There is no claim here, as there was in the *Laje* case, that the denial of an adequate hearing caused Swank monetizable emotional distress.) Swank may well fail to prove this, although in his favor is the fact that the City Council voted to discharge him by

only one vote. But in the event he does finally establish liability and does succeed in proving that he would not have been fired had it not been for the violation of his procedural rights, his damages will be greater if he can show that as a result of being fired for conduct unbecoming a police officer he has been excluded from his chosen occupation.

The district court dismissed the liberty of occupation count on the ground that Swank had received a fair hearing. We disagree, but it may make no difference to the ultimate outcome. Carthage has other strings to its bow. In the district court the defendants argued that "conduct unbecoming an officer" was not a sufficiently stigmatizing ground of dismissal to deprive Swank of his liberty of occupation. Compare *Adams v. Walker*, 492 F.2d 1003, 1008-09 (7th Cir. 1974), with *Hoffman v. City of Willimantic*, 680 F. Supp. 504, 507 (D. Conn. 1988). They also argued that they had not disseminated the charge publicly, as the cases seem to require. *Perry v. FBI*, 781 F.2d 1294, 1302-03 (7th Cir. 1986) (en banc); *Lawson v. Sheriff of Tippecanoe County, supra*, 725 F.2d at 1138. Against this it can be argued that when someone is dismissed for conduct unbecoming a policeman, if the department informs any other police department to which the officer applies concerning the ground on which he was fired, the effect will be to exclude him from police work as effectively as if the department had broadcast lurid charges against him on national television. (And there was some dissemination here, although apparently only to local newspapers.) But the parties have not briefed these issues and we therefore leave them for decision by the district court on remand.

The dismissal of Swank's substantive due process and First Amendment claims is affirmed, as is the dismissal of all his claims against the individual defendants except the claim involving the police chief's statement, but otherwise the judgment of the district court is reversed and the case remanded for further proceedings consistent with this opinion. We emphasize that it

will be necessary to determine on remand whether the defendants offered Swank a further evidentiary hearing after the hearing before the Public Safety Committee that produced the record on the basis of which the City Council decided to fire him.

Affirmed In Part, Reversed In Part, And Remanded With Directions.

MANION, *Circuit Judge,* concurring in part, dissenting in part. Although I take issue with some portions of the majority's interesting discussion of substantive due process and the First Amendment, I agree with its conclusion that no fundamental rights have been affected by the City of Carthage's action. I concur with the majority in affirming the dismissal of the substantive due process claims, the First Amendment claims, and claims against various individual defendants. The only question remaining is whether the City denied Swank his "tenured position without adequate procedural safeguards against erroneous deprivations."

I. Background

The motorcycle incident which gave rise to this case was not Gary Swank's first run-in with the Public Safety Committee. Swank previously had been accused of several job-related deficiencies including improper logging of activities, insufficient varying of his routes, improper patrolling, showing favoritism to his friends, and several instances of lying. On July 23, 1986, the Public Safety Committee notified Swank by letter that he was on "probation" until October 1, 1986. The committee stated it would terminate Swank at the end of the period if he did not improve his performance.

In the middle of the night of September 24 to 25 (near the end of the probation period), Swank gave Tina Millin, a 17-year-old student at the local college, a ride on his motorcycle. Carthage police officer Oral Lawrence observed the ride and reported it

the next day to the new Police Chief, James Smart. On October 1, Smart questioned Swank and reported that Swank initially denied the incident had happened, then admitted it. Smart asked Swank if he would resign. Swank wanted time to think about it. On October 2, Smart again asked Swank if he would resign. Swank refused.

Smart drafted a list of charges against Swank for the Public Safety Committee. The committee met on October 6. Smart told the mayor, who was a member of the committee, he had a statement from Tina Millin concerning the incident. The mayor replied the committee did not want to see the gory details, so Smart did not divulge the statement's contents. Smart presented the committee and Swank a list of seven charges relating to the motorcycle incident.[1] Bill Tomlinson chaired the

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[1] The page Smart presented the committee read in full:

ATTN: Mayor Nightingale & Public Safety Committee
REF: Officer Gary Swank
INCIDENT: Conduct Unbecoming a Police Officer

FACTS:

1. At approximately 1:30 am, the early morning hours of Thurs., Sept. 25, 1986, Officer Swank met a female college student at Robert Morris College Campus. They left the campus on his motorcycle and went west out of town.
2. Officer Swank is married.
3. Officer Swank's wife, Sally, was at home asleep.
4. Officer Swank was off-duty, not in uniform, and on his personal motorcycle during this incident.
5. On Wednesday, October 1, 1986, I interviewed Officer Swank about the incident. He at first lied to me about the incident and denied that the incident even occurred. He then admitted to the above mentioned facts and asked me if his wife had to be told. He then agreed to a false excuse why he was meeting with me, in case his wife asked.
6. Officer Swank believes he did nothing wrong and does not understand why I'm reporting this incident, since he was off-duty.
7. Officer Swank was already on probation at the time of this incident.

meeting and questioned Swank concerning the charges. After Swank responded, Smart submitted a second page to the committee and to Swank setting forth his personal observations on the importance of maintaining the trustworthiness of the police department.[2] The committee discussed the second page after Swank and Smart left the room. When Swank returned several minutes later, Tomlinson informed him the committee had decided to suspend him with pay pending the next City Council meeting.

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[2] Smart's second page read in full:

> ATTN: Mayor Nightingale & Public Safety Committee
> REF: Sept. 25, 1986 Incident involving Officer Gary Swank
>
> Much of our police work is done on and around campus. Not only do we investigate crime, enforce laws and make arrests on campus; we solve problems.
>
> We check on the well-being of students, at the request of their parents—who are many miles away. We discuss problem students with their parents, we've helped save the lives of many who've attempted suicide, we've guided many others away from attempting suicide, we help them when they have car trouble . . . the list goes on and on. School Officials welcome us on campus. They cooperate and help us in any way that they can and vice-versa.
>
> This is often the first time these young persons have been away from home. They and their parents are worried. When parents of these students are worried, they call *us*. They discuss their family's darkest secrets with us. We are Police Officers. We are supposed to be trustworthy; after all, the citizens of this community bestowed this sacred trust with us when they pinned that badge on us. But we must constantly continue to earn and keep that trust. When an Officer violates that trust, he commits a grave injustice to his Department and to the citizenry that he is sworn to serve and protect—to serve and protect with his life, if necessary.
>
> The people do not give their Police Officers respect and unquestioned trust with the badge. The Officers must *EARN* those things—both in and out of uniform.
>
> This incident has tarnished OUR badge!

The Carthage City Council met on October 14, 1986. Tomlinson outlined the incident to the council and stated the Public Safety Committee had recommended immediate termination. Swank was given no opportunity to respond at the meeting (although, as will be determined on remand, Swank may have declined a full hearing). The council voted 4-3 to terminate Swank because the incident "was his third write up [and was] damaging the good relationship the city police and the city had with the college students and the college personnel."

The majority holds the hearing before the Public Safety Committee violated due process in two respects: first, Smart did not divulge the contents of Tina Millin's statement; second, Smart submitted a second page of personal observations to the committee, thus making an allegedly improper *ex parte* communication. I do not believe either of these alleged defects rises to the level of a due process violation.

II. Tina Millin's Statement

Smart offered Tina Millin's statement to the committee, but withheld it when the mayor said he did not want to hear the "gory details." The majority contends Smart's subsequent silence could be taken as an affirmation that the statement did contain gory details, thus prompting the committee members to presume the worst. In *Lee v. Hutson,* 810 F.2d 1030 (11th Cir. 1987), the Eleventh Circuit addressed a substantially similar issue. Jaxie Lee was a tenured employee of the Cobb County, Georgia Sheriff's Department. She was terminated after receiving a hearing before the Cobb County Civil Service Board. Among other things, she claimed the sheriff and the county violated her due proces rights by failing to present exculpatory evidence at the hearing. The court first addressed Lee's substantive due process claim. Citing *Bishop v. Wood,* 426 U.S. 341 (1976), the court held, "[I]f a deliberate lie by governmental employer does not amount to an independent constitutional tort, then an alleged *Brady* violation during an employ-

ment hearing also fails to constitute a substantive due process violation." *Id.* at 1032-33. The court then noted "[a]lthough procedural due process might be violated if a mechanism for correcting these alleged errors were not available, Georgia does provide avenues for redress of such claims. . . ." *Id.* at 1033. Georgia had a procedure for certiorari review, just as Illinois has in this case. *Odell v. Village of Hoffman Estates,* 110 Ill. App. 3d 974, 443 N.E.2d 247, 249 (Ill. App. 1 Dist. 1982). ("Under the writ [of certiorari], the trial consists only of a review of the administrative records. The reviewing court must ascertain whether the agency had jurisdiction and acted within its jurisdiction, whether it proceeded according to law and acted on the evidence, and whether there is anything in the record which fairly tends to sustain the action of the agency.") If Smart's silence (about whether the statement was "gory") can be taken as an affirmation, and that affirmation misled the committee, its effect likewise can be no worse than that of a deliberate lie. See also *Hudson v. Palmer,* 468 U.S. 517 (1984). As in *Lee,* Smart's failure to produce Millin's statement gives rise to neither substantive nor procedural due process claims.

The majority concludes Smart's failure to disclose the contents of Tina Millin's statement violated Swank's due process rights, but holds the individual defendants free of liability under the doctrine of qualified immunity. Carthage nevertheless remains liable, but why? Assuming Smart violated Swank's rights, he did so by misrepresenting the facts to the Public Safety Committee. The committee itself did nothing to encourage the misrepresentation. The mayor simply stated he did not want to hear the gory details; Smart could have responded, "The details might not be as gory as you suspect." The wrong, if any, was committed by Smart, not the committee. Therefore the City of Carthage is liable only if Smart had "final policymaking authority" as a matter of state law. *Jett v. Dallas Independent School District,* 109 S.Ct. 2702, 2723 (1989). But he did not have that authority. The final policymaking authority for Swank's termination in this case rested with the City Coun-

cil—Smart and the Public Safety Committee merely made recommendations. Under *Jett,* the City of Carthage is not liable for Smart's actions.

III. Smart's *Ex Parte* Communication

I have no difficulty characterizing Smart's second page as an *ex parte* communication even though Swank received a copy at the same time as the committee. However, as this court concluded in *Shidaker v. Carlin,* 782 F.2d 746, 752 (7th Cir. 1986), judgment vacated on other grounds, *Tisch v. Shidaker,* 481 U.S. 1001 (1987), "[n]ot every *ex parte* communication is a procedural defect so substantial and so likely to cause prejudice that it entitles the claimant to an entirely new administrative proceeding." *Ex parte* evidence is not fatal if it is cumulative. *Shidaker,* 782 F.2d at 753. Even an *ex parte* charge (as opposed to mere evidence or argument) was held harmless in *Shidaker.*[3] "Many . . . cases have found *ex parte* communications in administrative hearings to be harmless error." *Id.*

The issue is whether the deprived party receives notice and a chance to offer his side of the story. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 546 (1985). If the *ex parte* communication is cumulative, the deprived party essentially has received notice by virtue of the prior non-*ex parte* charges and evidence. That is the case here. Swank knew the committee was considering recommending termination because of the motorcycle incident. He knew he was accused of conduct unbecoming a police officer. The *ex parte* communication only related Smart's assessment of the incident's possible damage. Swank

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[3] In *Shidaker,* the aggrieved party had a chance to cure the procedural defect at a subsequent *de novo* hearing. There is some dispute as to whether Swank had a similar opportunity. However, the *Shidaker* court found the *ex parte* contact "already unlikely to do any harm" before the *de novo* hearing was even taken into consideration. *Shidaker,* 782 F.2d at 753.

must have known that any damage due to the incident was an issue. He had been warned of other misconduct and was on probation. This single and relatively benign *ex parte* communication did not so prejudice Swank's interests as to poison the hearing. It was at most harmless error, and as such did not rise to the level of a due process violation. *Shidaker,* 782 F.2d at 752.

IV. The Alleged Deprivation Arose From Random and Unauthorized Conduct

For the above stated reasons, I believe the Public Safety Committee hearing satisfied due process. However, under *Parratt v. Taylor,* 451 U.S. 527 (1981), we should not even reach the issue of the hearing's validity.

Under *Parratt v. Taylor* and *Hudson v. Palmer,* 468 U.S. 517 (1984), random and unauthorized acts by state agents, even if intentional, do not violate procedural due process requirements so long as the state provides a "meaningful post-deprivation remedy." In Illinois, "an interested party who has been aggrieved by a ruling of an administrative body has a right to have the proceeding reviewed by the common law writ of certiorari." *Odell v. Village of Hoffman Estates, supra,* 443 N.E.2d at 249. Granted, this review may not provide all the remedies Swank has under § 1983, but a certiorari procedure is a meaningfull post-deprivation remedy under *Parratt* and *Hudson.* See also *Lee v. Hutson, supra,* 810 F.2d at 1033.

The City of Carthage's employment manual specifies a termination procedure for all city employees.[4] When an employee is performing unsatisfactorily, his supervisor must meet with him and give him a written list of the evidence of any deficiencies. If the employee's unsatisfactory behavior continues, the supervisor must meet with him two more times before recommending termination to the appropriate committee of the City Council. The committee's chairman will then notify the employee of his termination.

The record contains no evidence the City either formally repealed the manual's termination provision or effectively repealed that provision by routinely ignoring it. The manual's procedure was the City's policy at the time of the motorcycle incident. Therefore, the manual's termination procedure should have been used in Swank's case. Swank alleges at ¶20 of his complaint that defendants failed to follow the manual's pro-

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[4] The employment manual provides in full at section II.E:

> Termination of an employee for unsatisfactory performance may occur after the employee's immediate supervisor has met with the employee 3 times. The first time the supervisor will list in writing those things that he or she feels are evidence of poor performance and make suggestions as to what the employee should do to correct the deficiencies. The list will be dated. On the second occasion the supervisor will review the list and point out those items in which the employee has not improved and point out that if the deficiencies are not corrected by a date which is indicated in writing that the employee will be recommended for termination. At the third meeting, the supervisor will indicate to the employee which deficiencies have not been corrected and will then recommend his or her termination to the appropriate committee of the City Council. . . . The employee will then be notified by letter or in person of his or her termination by the chairman of the appropriate committee. IMMEDIATE termination of an employee will normally occur only if the employee threatens or carries out physical harm or other gross misconduct to a fellow employee or supervisor which is unprovoked.

cedure. The facts support this allegation. The defendants had no authority to supplant the manual's procedure with the probation-hearing-termination procedure used in this case. This isolated instance of ignoring the established termination procedure was truly random and unauthorized.[5] Under *Parratt*, defendants cannot be held liable for violating Swank's procedural due process rights.[6]

I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[5] The Supreme Court's recent analysis of *Parratt* (*Zinermon v. Burch*, 110 S.Ct. 975 (1990)), does not affect the outcome here. In *Zinermon*, Burch alleged that defendant hospital officials committed him to state mental facilities without properly determining whether he was competent to give informed consent. Because the state delegated to the hospital administrators both the power to confine and the authority to initiate safeguards against unlawful confinement, the Court held that the decision was not random or unauthorized. In *Zinermon*, the state could foresee that disoriented mental patients might sign consent forms; therefore, the Court held state procedures should guard against this. In this case, Smart ignored established state termination procedure. His conduct was unforeseeable from the state's perspective, and *Parratt* does apply.

[6] The parties did not argue this issue on appeal. However, "[a] reviewing court can affirm a judgment on any ground, if the record discloses a fair basis for doing so." *Klingman v. Levinson*, 877 F.2d 1357, 1360 n.3 (7th Cir. 1989).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 86-1306

GARY D. SWANK,
Plaintiff,

v.

JAMES SMART, et al.,
Defendants.

ORDER

(Filed: December 16, 1988)

Cross-Motions for Summary Judgment have been presented to the court for resolution in this case, filed pursuant to 42 U.S.C. §1983. As fully described below, the Court DENIES the City's and remaining Defendants' Motion as to Plaintiff's liberty interest, DENIES Smart's Motion, DENIES each of Plaintiff's Motions, and, *sua sponte,* GRANTS summary judgment for all Defendants. By virtue of this latter ruling, the Motion filed by the individual Defendants is MOOT.

FACTS

Plaintiff, Gary Swank, was hired by the Carthage Police Department as a permanent police officer on September 1, 1984. He had been working as a part time police officer for the City since February of 1981. As a permanent employee of the City, Swank became subject to the terms and conditions of a document which is entitled, "Manual of: A. Fringe Benefits and Policies Set by the City Council and B. Guidelines for Employee Evaluation, Job Expectations, Working Hours, and Salaries for Employees of the City of Carthage" (hereinafter referred to as "employee manual"). The employee manual provides that a permanent employee may be terminated for un-

satisfactory performance after his or her immediate supervisor has met with the employee on three occasions. Employee Manual at 5. The manual further sets forth the specific procedure which must be followed prior to termination. *Id.*

On July 23, 1986, Swank was placed on probation until September 30, 1986 for improper logging of activities, not varying his routes, showing favoritism toward his friends, and having improperly patrolled on a snowy day in January of 1986. William Tomlinson dep. at 33. At the time that Plaintiff was placed on probation, William Tomlinson, chairman of the Public Safety Committe of the Carthage City Council, spoke to Plaintiff for 45 minutes to advise Plaintiff of the various perceived deficiencies in his performance. *Id.* at 23. Tomlinson acknowledged his feelings that Swank had not received good guidance and instruction from the previous police chief, Pete Totsch, who has been fired effective August 1, 1986. *Id.* at 8-10.

Swank's probationary period apparently was uneventful until the evening of August 24, 1986. According to Swank, after he and his wife returned home from dinner late that evening, he needed to talk to a Hancock County Deputy Sheriff named John Jefferson about test firing a new gun Jefferson had just purchased. Swank dep. at 138, 139. Jefferson worked the 7:00 p.m. to 3:00 a.m. shift at the Hancock County Sheriff's Department. *Id.* at 139. Swank claims that he could not immediately find Jefferson, so Swank rode his motorcycle around the town of Carthage waiting for Jefferson to return either to the Sheriff's Department or to the adjacent donut shop. *Id.* at 141-54. In the course of his ride, Swank drove through the intersection of U.S. 136 and College Avenue in Carthage three times. At this intersection, two teenage girls, whom Swank had never seen before, waved at him. *Id.* at 154.

After Swank's fourth trip through the intersection, Swank rode over to where the girls were sitting and held a conversation

with them. After talking for awhile, Swank took one of the girls, Tina Millin, a 17 year old student at Robert Morris College, for a ride. During this ride, which lasted from 20 to 30 minutes, the two talked about Tina's schooling, how she liked Carthage, and her boyfriend. *Id.* at 168-74. At the end of the ride, Swank took Tina back to the place where he had met her and left her in the company of the other girl. *Id.* at 172. No discussion of sex, a relationship, or Swank's seeing Tina again was discussed. *Id.* at 158-74; James Smart dep. of February 6, 1987 at 7-8.

Another Carthage police officer, Oral Lawrence, saw Swank and Tina Millin on Swank's motorcycle. Lawrence dep. at 56-67. The next day, September 26, 1986, Lawrence reported to James Smart, the Carthage police chief, that he saw Swank on the motorcycle with a young girl. *Id.* at 57-58, 64. Lawrence claims that he reported the incident because it was "unusual" in that Lawrence "had never seen Swank [out] before that night." *Id.* at 66. Lawrence was aware that Swank was off duty at the time. *Id.* at 67.

On either September 30, 1986 or October 1, 1986, Smart confronted Swank with the information that Swank had been seen on the motorcycle with a young woman. Smart dep. of January 6, 1987 at 114; Swank dep. at 211-12. According to Smart, Swank first denied giving a girl a ride, and then admitted it. Smart dep. of January 6, 1987 at 118-19.

After the meeting with Swank on September 30 or October 1, 1986, Smart met with James Nightengale, Mayor of the City of Carthage, and advised Nightengale of the circumstances. *Id.* at 145. At that point, Nightengale advised Smart to prepare a complaint. *Id.* According to Nightengale, he and Smart agreed to keep the circumstance quiet. Nightengale dep. at 80-81.

On October 2, 1986, Smart met again with Swank to request Swank's resignation. Smart dep. of January 6, 1987 at 146-47. According to Smart, Swank requested time to think about

Smart's proposal and said that he would get back to Smart. *Id.* at 148, 149. As of the October 2 meeting, Swank had no intention of resigning and so informed Smart. Swank dep. at 227. Smart told Swank that he would check with him on Sunday, October 5, to see whether or not Swank had changed his mind about resigning. *Id.* When Smart did so, Swank reiterated that he was not going to resign. Smart depo. of January 6, 1987 at 149.

Following his conversation with Swank, Smart drafted a list of charges. *Id.* at 150-51. Smart did so in order to present the charges to the Public Safety Committee, which was going to meet on the evening of October 6, 1986. *Id.* Smart had cleared this procedure with Mayor Nightengale. *Id.* at 155.

Prior to the meeting of the Public Safety Committee on the evening of October 6, 1986, Smart learned the identity of the girl to whom Swank had given the ride. Smart dep. of February 6, 1987 at 4-7. Smart met with the girl, Tina Millin, and received a statement from her, which Smart reduced to writing. Smart dep. of January 6, 1987 at 128-32. Smart had no reason to disbelieve what Tina Millin told him. *Id.* at 133.

Although Smart had Tina Millin's statement prior to the Public Safety Committee meeting of October 6, 1986, he never showed her statement to anyone. *Id.* at 137. However, he did at some point tell Tomlinson and Nightengale that he had a statement from the young woman involved in the incident. *Id.* at 138-39. In their depositions, both Tomlinson and Nightengale testified to their belief that they were aware of Smart's possesion of such a statement prior to the October 6 meeting. Tomlinson dep. at 50; Nightengale dep. at 84-85. Tomlinson and Nightengale both told Smart that they did not want to see the statement because "they didn't want to know all the gory details." Smart dep. of January 6, 1987 at 138; Nightengale dep. at 85. Smart was aware that Tomlinson and Nightengale did not know what Tina Millin had told him and he

did not know how they would react had they known. Smart dep. of January 6, 1987 at 142.

On the evening of October 6, 1986, Swank attended the Public Safety Committee meeting. Swank dep. at 233. Present at the meeting were members of the Committee: Bill Tomlinson, Bill Reed, Raymond Myers, and Mayor Jim Nightengale, who was an *ex officio,* non-voting member of the Committee. *Id.* at 234. At the beginning of the meeting, James Smart handed out page 1 of the charges that he had drafted. Next, Tomlinson, who was in charge of the meeting, read each of the seven charges aloud and requested that Swank respond to them. *Id.* at 236; Tomlinson dep. at 55-59. With respect to charge 1, Swank said that the motorcycle ride happened at 12:30 a.m., rather than 1:30 a.m., Swank dep. at 236; Tomlinson dep. at 55-59; with respect to charge 3, Swank acknowledged that his wife was at home, but claimed that she had been awake, Swank dep. at 237; Tomlinson dep. at 55-59; as to charge 5, Swank denied that he lied to Smart about the incident, but merely had told Smart that he did not have a girlfriend, Swank dep. at 238; Tomlinson dep. at 55-59; further, because Swank stated that his wife already knew about the incident, he did not agree to any false excuse for the benefit of his wife, Swank dep. at 239-40, Tomlinson dep. at 55-59. Swank admitted the rest of the charges. Swank dep. at 237, 241; Tomlinson dep. at 55-59.

At the conclusion of Tomlinson's questioning of Swank regarding his reactions to the seven charges, Smart distributed another sheet of paper. In this document, addressed to Mayor Nightengale and the Public Safety Committee, Smart made statements to the effect that the incident involving Swank and Tina Millin "tarnished" the badge of the police officers of the City of Carthage. Smart stated that parents of the students at Robert Morris College placed their trust in the police force of the City of Carthage and that, when those parents worry about their children, they call upon the Carthage police force. Smart contended that members of the Carthage police force "must con-

stantly continue to earn and keep that trust." The writing also included Smart's claim that when that trust is violated by an officer, "he committs (sic) a grave injustice to his Department and to the citizenry that he is sworn to serve and protect. . . . "

Each person at the meeting read the second document to himself. Swank dep. at 242, 150. There was no discussion with respect to this second document. *Id.* at 250. Next, Swank and Smart were directed by the Committee to step outside. *Id.* The two remained outside the meeting room for about 15 minutes. *Id.* at 251. Upon their return, Tomlinson informed Swank that the Committee had reached a decision to suspend him with pay until the next City Council meeting. *Id.* Swank was also requested to turn in his badge. *Id.*

Swank then inquired as to his entitlement to a hearing. Swank dep. at 252; Tomlinson dep. at 67. There seems to be some dispute as to what happened at that point. According to Swank, Nightengale told him that he was entitled to a hearing, and that Swank said, "Okay," in response. Swank dep. at 252. According to Plaintiff, Nightengale then said that things would be arranged for such a hearing, and that Swank again replied, "Okay." *Id.* No mention of a time or date was made. *Id.* at 255. However, Tomlinson testified in his deposition that, in response to Plaintiff's question about a hearing, Mayor Nightengale stated, "if you don't think you had a hearing, Gary, we will set one up." Tomlinson dep. at 67. According to Tomlinson, Swank responded, "Well, I guess I have and . . . I'm not going to sue you anyway." *Id.*

The Carthage City Council met on October 14, 1986. At that meeting, Tomlinson, chairman of the Public Safety Committee, reported to the City Council that Chief of Police Jim Smart had written up the incident of Swank's motorcycle ride of September 25, 1986. Tomlinson told the City Council of Smart's feeling that Swank's behavior respecting this incident "was conduct unbecoming to a police officer." Tomlinson further informed the City Council that the Public Safety Committee recommend-

ed that Swank's employment with the City of Carthage be terminated immediately.

After Tomlinson's presentation, the City Council members held a discussion, during which some members expressed their feelings that there was no just reason for Swank's dismissal, because the incident had occurred while Swank was off-duty. Nevertheless, the City Council voted to terminate Swank for the reasons that the incident "was his third write up [and] and incident [was] damaging the good relationship the city police and the city had with the [Robert Morris] college students and college personnel."

During the period following his discharge, Swank has been employed by his grandfather in a farming operation, and has also worked part time for an agricultural business in the Carthage area. Swank dep. of August 12, 1988 at 3-22. He has also applied for various police positions, but has not been hired. *Id.* Swank testified in his deposition that he has been approved for hiring by the police departments of Quincy and Batavia, Illinois, and that his name is on those communities' waiting lists. Swank applied for both of those positions following his termination by the City of Carthage. *Id.* at 17-20. Swank also testified that he was approved for hiring by the police department of the City of Plainfield, Illinois in April of 1987. However, he was subsequently told that that police department hired two other people, so that Swank is no longer on their list of potential hirees. No other reason was given for Plaintiff's failure to hire him. *Id.* at 20-22.

MOTION FOR SUMMARY JUDGMENT ON BEHALF OF SMART, INDIVIDUALLY

In his Motion for Summary Judgment, Defendant James Smart states that the principal basis of Swank's claim for damages is based upon Plaintiff's assertion that he was improperly discharged by the City Council of the City of Car-

thage. Smart states that he was not a member of the City Council, and did not have a right to vote, and did not vote, on the decision to discharge Swank. Consequently, to the extent that Swank is basing his claim on the action of the Public Safety Committee of the City of Carthage, no liability should attach to Smart because he was not a member of that Committee.

Smart argues that the city Marshal has a right to appear before the Public Safety Committee to report the conduct of officers serving under him. Smart claims that he likewise had a right, as Chief of Police, to report to the Committee conduct that Smart thought was improper conduct for a member of the police force. Regardless of the action later taken by the Committee or the City Council, Smart claims that his report did not deprive Swank of any rights and cannot be the basis of any cause of action against Smart.

The Court disagrees with Smart, and DENIES his Motion for Summary Judgment. Of course, in order for Swank to recover damages from Smart, Swank must establish that Smart was personally responsible for the claimed deprivation of a constitutional right. *Crowder v. Lash,* 687 F.2d 996, 1005 (7th Cir. 1982). Yet, the facts of this case may be sufficient to establish that Smart was responsible for the alleged deprivation of Plaintiff's constitutional rights.

The mere fact that Smart did not vote to terminate Swank's employment is not dispositive. Smart was the moving force behind the decision to terminate Swank's employment. He actively participated in the meeting of the Public Safety Committee. In fact, it was Smart who was the source of the information upon which the Committee based its decision, and, in that capacity, Smart may reasonably be said to have had a duty to provide the Committee with an unbiased, complete account of the underlying facts. Arguably, Smart did not do so in this case, particularly by not providing the Committee members with the statement given by Tina Millin.

The case of *Woodall v. Partilla,* 581 F.Supp. 1066 (N.D. Ill. 1984), which Smart cites in support of his position, is not to the contrary. There, the district court dismissed the complaint against defendant Partilla on the ground that Partilla's departure from institutional procedures which are not constitutionally mandated did not provide a basis for a constitutional claim. It was this finding which formed the basis for the Partilla court's statement that, "regardless of the analytical approach utilized, the claim that Partilla set the disciplinary proceedings in motion illegally so that the very fact of the proceedings violated Woodall's constitutional rights is not cognizable under §1983." *Partilla,* 581 F.Supp. at 1072. In other words, the issue in *Partilla* was whether or not there had been a constitutional deprivation of any kind; the issue was not who was responsible for such deprivation, as is the situation here. *Partilla,* then, is inapposite to Smart's Motion.

Because it is possible that Plaintiff could show some causal connection between Smart's conduct, and a deprivation of Swank's constitutional rights, if, in fact, any such deprivation occurred, Smart's Motion for Summary Judgment is DENIED.

PLAINTIFF'S DUE PROCESS CLAIMS

Defendants, arguing that they committed no acts and uttered no statements which rise to the level of an infringement of Swank's constitutionally protected right to liberty, seek summary judgment against Plaintiff on his claim of a deprivation of a liberty interest with due process of law as asserted in ¶29(b) of Counts I and II of Plaintiff's Second Amended Complaint. Plaintiff, in turn, has moved for summary judgment on his claims that he was deprived of both a property interest and a liberty interest without due process of law.

In Swank's Second Amended Complaint, he alleges that he was stigmatized "with a badge of immorality" and "the false charge of conduct unbecoming to a police officer and neglect of

duty," and that his "good name, reputation, honor, and integrity" were thereby impugned. As a result of this detraction, he contends that "his ability to secure other employment is necessarily adversely implicated without affording him an opportunity to respond and to rebut those charges." Defendants state that, during discovery, Swank has been more specific in designating the language that he believes has infringed his constitutionally protected right to liberty.

During the course of discovery, Defendants propounded, among others, the following interrogatory to Plaintiff:

> *Interrogatory No. 6*
>
> Provide a verbatim account of any and all statements that Plaintiff contends were made by any of the Defendants herein that impaired his liberty interest as alleged in Plaintiff's Complaint.

According to Defendants, Plaintiff attached, as his response, the document which Smart drafted containing the seven charges against Swank, as well as four newspaper articles with certain excerpts highlighted. These articles were the following:

1. On October 15, 1986, *The Daily Gate City Journal* reported in an article written by P.L. Fooken:

> The Council's Public Safety Committee recommended the action after patrolman Gary Swank received three written notices within six months. The Committee based its recommendation on the City's personnel manual, Mayor James Nightengale said.
>
> * * *
>
> Swank received two written notices involving neglect of duty and a third for conduct unbecoming to a policeman, said Committee Chairman William Tomlinson.
>
> "I won't go any farther than that," he said.

2. On the same date, the Macomb *Daily Journal* reported, in another article written by P.L. Fooken:

> The Council Tuesday voted 4 to 3 to release patrolman Gary Swank. The group's Public Safety Committee recommended the action after Swank received three written notices within six months. The Committee based its recommendation on the City's personnel manual, said Mayor James Nightengale.

3. Also on October 15, 1986, another article by Fooken, this one in the Quincy *Herald-Whig,* included the following excerpt:

> The Council's Public Safety Committee recommended the action after Swank received three written notices within six months. The Committee based its recommendation on the City's personnel manual, Mayor James Nightengale said.
>
> * * *
>
> Swank received two written notices from superiors involving neglect of duty and a third for conduct unbecoming to a policeman, said Committee Chairman William Tomlinson. "I won't go any farther than that."

4. The final article submitted by Swank appeared, without a byline, on November 19, 1986, in the Hancock County *Journal Pilot*. This article was a report with respect to Swank's lawsuit against Defendants. In a synopsis of Plaintiff's Complaint, the *Journal Pilot* reporter included the following statements, by which Plaintiff claims his liberty interest was impaired:

> [At an October 6 Public Safety Committee meeting] Smart presented Swank a two page document concerning Swank's alleged conduct unbecoming of a police officer, the suit says.
>
> * * *

> The Council voted on October 14 to dismiss Swank pursuant to Smart's charges against Swank of conduct unbecoming of a police officer, according to the suit.

Defendants highlight the fact this final article, which summarizes the allegations in ¶¶21 and 22 of Plaintiff's original Complaint, is the only article which mentions a two page document and is the only one which relates Plaintiff's dismissal to the charge of conduct unbecoming of an officer, something which Tomlinson avoided doing in the three earlier articles.

Plaintiff has alleged that his termination for "conduct unbecoming a police officer" was supported by "false and malicious" statements with "immoral and pejorative implication(s)." Plaintiff also asserted in his Second Amended Complaint that the vague nature of the charges permitted widespread speculation as to the actual nature of his wrongdoing and had a negative reputational impact far greater than would have occurred with a definite statement. Swank also has charged Tomlinson with falsely and maliciously reporting on Swank's performance. In particular, Plaintiff has alleged:

> The Defendant Tomlinson gave false statements to at least the *Daily Gate City* of Keokuk, Iowa, that Plaintiff had received two written notices involving "neglect of duty" and a third for "conduct unbecoming a police officer," which statements were published in said newspaper and given wide circulation, notwithstanding their absolutely false and malicious character in which Plaintiff was given no opportunity to address and rebut.

Defendants state that it is unclear to them what the claimed falsity is.

In *Board of Regents v. Roth,* 408 U.S. 5644 (1972), the United States Supreme Court described the type of statements which, coupled with a discharge, may constitute a deprivation of an individual's liberty interest. In *Roth,* the Supreme Court

explained that, in order to be actionable, statements must charge dishonesty and immorality or damage an individual's name, reputation, or integrity. As an alternative test, the Court noted that a liberty interest might be implicated where the comments place a stigma upon the plaintiff, and that the stigma is sufficient to foreclose him from future employment opportunities.

According to Defendants, they have made no statements which charged Swank with immorality or dishonesty, or which damaged his name, reputation, or integrity. They contend that the complaints about Swank's performance are nothing more than evaluations of his professional skills and conduct by the Chief of Police and a committee of the City Council specifically charged with making such assessments. *See, Munson v. Friske,* 754 F.2d 683, 694 (7th Cir. 1985).

Defendants also argue that they have made no statements which impose a stigma on Plaintiff sufficient to foreclose him from future employment opportunities. According to Defendants, Plaintiff has not even alleged that he has been permanently excluded from or suffered a protracted interruption of employment. All that Plaintiff has claimed is that he lost the job in question, and that the stated reasons for the termination "Necessarily adversely implicated" his ability to secure other employment. Yet, even if potential employers had known of and considered the comments made by Defendants Smart and Tomlinson, Defendants argue that Plaintiff's liberty interest is not and cannot be implicated or infringed as a result of them, because the statements are not stigmatizing.

In support of their position, Defendants cite the case of *Perry v. FBI,* 781 F.2d 1294 (7th Cir. 1986), in which the Seventh Circuit provided the following analysis for determining whether a liberty interest has been deprived as a consequence of the imposition of a stigma or other disability:

> After examining the cases cited in *Board of Regents v. Roth,* this court in *Adams [v. Walker,* 492 F.2d 103 (7th Cir. 1974)], concluded that no stigma to reputation occurred when the Governor of Illinois dismissed the plaintiff from his position as chairman of the Illinois Liquor Commission for incompetence, neglect of duty and malfeasance in office. The *Adams* court noted that "nothing in the complaint even remotely suggests a legal barrier to future employment analogous to denial of admission to the bar, disqualification from all government employment, . . . or sending substantial adverse information to a professional licensing agency.

492 F.2d at 1009.

Moreover, Defendants argue that the statements made by them do not reflect upon Swank's ability as a police officer any more than did the fact of the discharge in and of itself. According to Defendants, such a consideration was a substantial factor in the decision by the Seventh Circuit in *Smith v. Bd. of Ed. of Urbana School Dist. No. 116,* 708 F.2d 258 (7th Cir. 1983). Defendants claim that a similar analysis is applicable to this case.

The Court agrees with Defendants that Plaintiff has failed to state a claim for a liberty deprivation on the ground that the statements imposed a stigma on him sufficient to foreclose him from future employment opportunities. As Plaintiff himself has testified, he has secured part time employment since his discharge, and he has been placed on waiting lists for employment with the police departments of the Cities of Qunicy and Batavia, Illinois. Plaintiff emphasizes, however, that he has never been hired by these cities. He also claims that an individual is placed upon a waiting list when he (1) makes an application; (2) passes a written test; and (3) passes a physical agility test. Nevertheless, there is no proof in the record that the conduct of the Defendants has impeded his ability to find work in the same occupation. That is the crucial issue.

Plaintiff also testified that he was "approved for hiring" by the police department of the City of Plainfield, Illinois. In Plaintiff's reply and appendix to Defendants' memorandum in response to Plaintiff's Motion for Summary Judgment, Plaintiff contends that such testimony is "incompetent." Even disregarding Plaintiff's statement with respect to employment with the City of Plainfield Police Department, there is no basis for finding that the reason that he was not hired by that agency was the fact that he was terminated by the City of Carthage, in part, for "conduct unbecoming a police officer. Because there is no evidence in the record that Defendants' dismissal of Plaintiff and their statements surrounding his discharge have impeded his ability to secure future employment, Plaintiff cannot claim that he satisfies the second test as to the source of a liberty interest articulated by the Supreme Court in *Roth*.

On the other hand, the Court disagrees with Defendants as to their claim that they have made no statements which charge Swank with immorality or dishonesty, or which damaged his name, reputation, or integrity. Plaintiff's claim that the revelation that his dismissal was "for conduct unbecoming a police officer" could very well give rise to public speculation that he had been discharged for conduct far more reprehensible than that for which he was, in fact, discharged. Defendants seem to regard Tomlinson's refusal to elaborate on the nature of Swank's alleged offense to the press as laudable, yet, had Tomlinson known of the contents of Tina Millin's statement, his refusal to provide details may have caused excessive damage to Swank's reputation.

In *Lawson v. Sheriff of Tippacanoe County*, 725 F.2d 1136, 1138 (7th Cir. 1984), the Seventh Circuit noted that courts have found a deprivation of a liberty interest where the employee was fired for a publicly announced reason that impugned his moral character. Because the finder of fact in this case could reasonably determine that Tomlinson's report to the press that Plaintiff was dismissed "for conduct unbecoming a police of-

ficer" without more, may have impugned Swank's moral character, the standard enunciated by the *Lawson* court may be met in this case. Consequently, Defendants' Motion for Summary Judgment must be DENIED as to this ground.

With respect to Plaintiff's deprivation of property claim, the Court notes that property interests are not created by the United States Constitution, but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Once the existence of a property interest has been established, any deprivation of that property interest must "be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). In *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), the Supreme Court described "the root requirement of the due process clause as being 'than an individaul be given an opportunity for a hearing *before* he is deprived of any significant property interest'." *Loudermill,* 470 U.S. at 542 (footnote omitted), *quoting, Boddie v. Connecticut,* 401 U.S. 371, 379 (1971) (emphasis in original).

In *Patkus v. Sangamon-Cass Consortium,* 769 F.2d 1251 (7th Cir. 1985), the Seventh Circuit held that, under Illinois law, a public employer's statement of intent to implement a "dismissal for cause" policy permitted the inference of a contract type right in the employee. *Patkus,* 759 F.2d at 1263-64. Thus, the Seventh Circuit found that a property right created by Illinois law could be inferred in *Patkus* pursuant to *Board of Regents v. Roth.* It is Plaintiff's position that the employee manual created a property right in continued employment in him.

The Court agrees with Plaintiff that he had a property interest in continued employment with the City of Carthage Police Department. The employee manual sets froth specific procedures by which a permanent employee is to be terminated. Consequently, as in *Patkus,* it is a fair inference that Swank

possessed a contract-type right to continued employment, and that this right is a property right protected by due process. *See, Roth,* 408 U.S. at 570-71.

Because, as described above, the Court finds that Plaintiff had protectible property and liberty interests, the question then becomes, "Was Plaintiff deprived of his property right without due process?" As stated in *Loudermill,* due process requires "some kind of hearing" prior to the discharge of an employee who possesses a constitutionally protected property interest in his employment. *Loudermill,* 470 U.S. at 542. Plaintiff claims that he was denied a hearing. He points to the fact that after he either admitted or denied the seven charges made by Smart, he was given no opportunity to respond to the second page which was distributed at the Public Safety Committee meeting. He further contends that his request for a hearing was never honored.

Despite the lack of an opportunity to discuss the second document which was distributed, Swank claims that it was the second page that was the deciding factor because it reflected Smart's perceived harm that the motorcycle ride incident had done to the police department's relationship with Robert Morris College. According to Plaintiff, the determinative nature of this document is evidenced by the minutes of the City Council meeting at which Swank was fired. Those minutes, he claims, reflect that he was discharged because the motorcycle ride incident "damag[ed] the good relationship the City police and the City had with the college students and college personnel." Had there been some type of meaningful hearing and had Smart attempted to sustain the charges contained in the second document, Swank believes that the emptiness of those charges would been revealed and the City would not have dismissed Swank.

It appears to the Court that the requirements of due process have been met. The Public Safety Committee meeting provided Plaintiff with a chance to respond to the seven charges contain-

ed in the first document distributed by Smart. That first document specifically referred to the charge against Swank as being "conduct unbecoming a police officer," thus satisfying the requirement of notice that due process demands. Contrary to Swank's assertions, he was given an opportunity to be heard prior to his dismissal.

While Plaintiff claims that he never had a chance to respond to the "charges" contained in the second page which was distributed by Smart, the Court does not think that this second document can be fairly read as containing "charges." What this memorandum is is Smart's assessment of the ramifications of the incident of September 25, 1986 — not a continuation of the allegations against Gary Swank.

Plaintiff claims that Smart's own deposition indicates that Smart himself considered the second page as "charging" Swank with various derelictions of duty. In making these statements, Plaintiff directs the Court's attention to Smart's deposition of February 6, 1987, pages 27-32. However, a review of Smart's testimony reveals that Plaintiff mischaracterizes Smart's statements. For example, on page 28 of Smart's deposition, Plaintiff's counsel asked Smart:

> Q. . . . Do you construe [the second document] as charging Gary Swank as interfering with the Carthage Police Department's power or ability to investigate crime on the Robert Morris campus?
>
> A. It reflects my opinion that he has done damage to our professional image.

On page 29 of Smart's deposition, the following appears:

> Q. . . . Do you perceive that the Gary Swank incident with Tina Millin has interfered with the Carthage Police Department's ability to enforce the law on the Robert Morris campus?

A. I could see the very strong possibility for that, yes.

Q. All right. Do you construe Exhibit 3, page 2 as saying that Gary Swank has interfered with the ability of the Carthage Police Department to solve the problems on the Robert Morris campus?

A. I would say so, yes.

Q. Do you construe Exhibit 3, page 2 as charging Gary Swank with interfering with the ability of the Carthage Police Department to check on the well-being of students on the Robert Morris campus?

A. I would say that this incident has hampered that.

Q. Do you construe Exhibit 3, page 2 as charging Gary Swank with interfering with the Carthage Police Department's ability to discuss problem students on the Robert Morris campus with the parents of those students?

A. I would say this incident has hampered that.

Q. Okay. Do you construe Exhibit 3, page 2 as charging Gary Swank with interfering with the Carthage Police Department's ability to help save the lives of students who have attempted or may attempt suicide on the Robert Morris campus?

A. I can see where this incident would have hampered that.

Q. Okay. Do you construe Exhibit 3, page 2 as saying that Gary Swank has interfered with the ability of the Carthage Police Department to guide students away from attempted suicide.

A. I can see where this incident may have hampered that.

Smart's responses were identical to those above with respect to questions regarding the effects of the motorcycle incident on the

likelihood of student's families sharing their "darkest secrets" with members of the Carthage Police Department, on the ability of Carthage police to help students with car trouble, on the community of Carthage's trust of the Carthage Police Department, and on reputational injury suffered by the Carthage Police Department and the citizenry of Carthage. Thus, while Plaintiff claims that Smart himself considered this second memorandum to contain "charges," Smart's deposition testimony does not support Plaintiff's position. Rather, that testimony indicates that Smart believed that Swank's conduct had certain negative effects on the reputation of the Carthage Police Department. No accusations are made against Swank in the second memorandum; the only "charge" contained in that document is Smart's statement respecting "tarnishing" of the badges of the members of the Carthage Police Department.

Plaintiff highlights the fact that, in the minutes of the meeting of the Carthage City Council of October 14, 1986, there is reference to the Tina Millin incident as being "damaging [to] the good relationship the City Police and City had with the college students and college personnel." Pointing to this statement, Swank argues that the City Council adopted Smart's reasoning in the second document, and that this document formed the sole basis for the City Council's decision to terminate Swank's employment. However, Swank takes the above statement out of context. The entire paragraph in which the statement occurs reads as follows:

> A lengthy discussion followed [Tomlinson's report of the Public Safety Committee meeting of October 6, 1986] in which some of the aldermen felt there is not just reason for officer Swank's dismissal since the incident of September 25, 1986 occurred while Swank was off duty and on his own time. Some, however, felt that was just reason since this was his third write up as well as the incident damaging the good relationship of the city police and city had with the college students and college personnel.

Following the lengthy discussion among members of the City Council, the City Council voted to dismiss Swank.

While the above statement indicates that some City Council members may have been in accord with Smart's interpretation of the effects of the motorcycle incident on the relationship between Carthage police and Robert Morris College, it does not suggest that the council members regarded Smart's second document as a "charge." It appears then that Swank's claim that Smart's statements were the "but for" reason for Swank's discharge is disingenuous. There is evidence to support the proposition that the motorcycle ride itself was a motivating factor in Swank's discharge, but no evidence in the record supports his conclusion that the second document that Smart drafted was such a factor. Because Plaintiff received a hearing with respect to the motorcycle ride, he was given an opportunity to respond to the "charge" against him.

Because the Court finds that the hearing that Swank received before the Public Safety Committee comported with due process, Plaintiff's claims for a deprivation of liberty and property without due process are without merit. For this reason, Plaintiff's Motion for Summary Judgment as to his property and liberty claims are DENIED, and the Court *sua sponte* GRANTS summary judgment for Defendants as to Plaintiff's liberty and property claims.

PLAINTIFF'S FREEDOM OF ASSOCIATION CLAIMS

In this portion of Plaintiff's Motion for Summary Judgment, he contends that Defendants' conduct infringed upon his First and Fourteenth Amendment freedoms of association. That is, he claims that he had a First and Fourteenth Amendment right in September 1986 to give, while off duty, the 20 minute motorcycle ride to Tina Millin. Without question, Plaintiff's Motion must be denied on this ground.

The cases cited by Plaintiff himself in his Motion for Summary Judgment demonstrate that, in order to claim a protectable First Amendment Associational right, the association must relate to the advancement of beliefs and ideas, or, as an alternative, it must be association which furthers intimate interpersonal relationship. As stated by the United States Supreme Court in *NAACP v. Alabama,* 357 U.S. 449, 460 (1958), it is "beyond debate that freedom to engage in *association for the advancement of beliefs and ideas* is an inseparable aspect of the liberty assured by the due process clause of the Fourteenth Amendment which embraces freedom of speech." (Emphasis added). Also, in *Roberts v. United States Jaycees,* 468 U.S. 609, the Supreme Court recognized two types of protected association, "intimate association" and "expressive association." According to Plaintiff, it is with respect to the concept of "expressive association" that the Supreme Court's decision in *Roberts* speaks to the instant case. Swank bases this argument on the *Roberts* court's statement that it has been "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts,* 468 U.S. at 622. It appears that Swank hangs his argument upon the "social" portion of the Supreme Court's statement in *Roberts.*

Plaintiff, however, was not seeking to advance any beliefs by his motorcycle ride with Tina Millin. Consequently, his "association" with her is not the type of "expressive association" that is entitled to First Amendment protection. While it is true that the Supreme Court in *Roberts* stated that the First Amendment protects a right to engage in activities in pursuit of a variety of social ends, the Court has never construed the First Amendment to encompass the type of "social" endeavors which Plaintiff's position envisions. It is evident from the context in which the Supreme Court's use of the word "social" appears that the Supreme Court was not referring to recreational

pursuits but, rather, that it was speaking to matters which concern relationships among members of a community. Swank's application of First Amendment "expressive association" principles to the facts of this case is without merit. His Motion for Summary Judgment on this ground is DENIED, and the Court *sua spont* GRANTS summary judgment on this ground for Defendants.

Likewise, Plaintiff claims that his "association" with Tina Millin is entitled to protection pursuant to the Fourteenth Amendment. He contends that the line of cases cited by the Supreme Court in *Roberts* give rise to the right of "intimate association" which forms the predicate of his right to individual liberty secured by the Fourteenth Amendment due process clause. This Court disagrees.

The *Roberts* Court itself explained that the cases to which Plaintiff refers involved family and personal relationships which were characterized by "deep attachment and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts,* 468 U.S. at 620. According to the Court in *Roberts,* those qualities "reflect the considerations that have led to an understanding of association as an intrinsic element of personal liberty." *Id.*

The "deep attachments and commitments" referred to by the *Roberts* Court are entirely absent from the facts of this case. There is no question that, at the time of the motorcycle ride, Swank had just met Tina Millin and, as Plaintiff repeatedly emphasizes, that motorcycle ride lasted a mere 20 minutes. Also, Swank repeatedly insists that the two discussed matters no more intimate than Tina Millin's opinion of Robert Morris College, the City of Carthage, and her relationship with her boyfriend. It is apparent that Swank's "relationship," or lack thereof, with Tina Millin is not the type of "intimate association" protected

by the First and Fourteenth Amendments of the United States Constitution, and that Swank's Motion for Summary Judgment on this ground must be denied.

The case of *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1973) which Plaintiff cites in support of his argument, is not to the contrary. *Thorne,* unlike this case, involved a refusal to hire the plaintiff on the basis of her admittedly intimate sexual relationships. As stated by the *Thorne* court, "in this case the inquiry by the City of El Segundo that appellant challenges under §1983 bears on those matters acknowledged to be at the core of the rights protected by the Constitution's guarantees of privacy and free association — appellant's interest in family living arrangements, procreation and marriage." *Thorne,* 726 F.2d at 469. In *Thorne,* the plaintiff was questioned as to the social and sexual relations she may have had with members of the police department, and was pressed to name the father of a child she lost. *Id.* It is evident, then, that the associations at issue in *Thorne* are quite unlike the "association" between Swank and Tina Millin. The former related to intimate sexual relations; the latter, to an "innocent" conversation during a motorcycle ride. For this reason, Plaintiff's Motion for Summary Judgment is DENIED, and the Court again GRANTS summary judgment *sua sponte* in favor of Defendants on this ground.

PLAINTIFF'S STATE LAW CLAIM

As a result of the Court's rulings in this Order, the only claim in Plaintiff's Second Amended Complaint that remains viable is his state law breach of contract claim against the City of Carthage (Count III). Ordinarily, when the federal claims are dismissed, a federal court should dismiss pendent state law claims. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). An exception to this rule exists when substantial judicial resources have been expended in adjudicating facts which are critical to such claims. *Moses v. County of Kenosha,* 826 F.3d

708, 710-11 (7th Cir. 1987). Because this Court has not expended substantial judicial resources with respect to Swank's breach of contract claim, the Court will not exercise pendent jurisdiction over that claim. Consequently, the Court hereby DISMISSES Count III of Plaintiff's Second Amended Complaint without prejudice.

CONCLUSION

For the reasons delineated above, the Court DENIES Smart's Motion for Summary Judgment, DENIES the Motion for Summary Judgment of the City of Carthage and the remaining Defendants as to Plaintiff's liberty claim, DENIES Plaintiff's Motions for Summary Judgment, and *sua spont* GRANTS summary judgment in favor of Defendants as to Plaintiff's freedom of association and due process claims, (Counts I and II). Due to this disposition of Plaintiff's claims, the Motion for Summary Judgment on behalf of Defendants individually is MOOT. Finally, because the Court hereby disposes of all of Swank's federal law claims, the Court DISMISSES Count II, Swank's state law claim, without prejudice.

It is so ordered this 16th day of December, 1988.

/s/ Michael M. Mihm
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 27, 1990

Before

Hon. Richard D. Cudahy, Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

No. 89-1360

Gary D. Swank,
Plaintiff-Appellant,

v.

James Smart, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Central Division of Illinois,
Peoria Division.
No. 86 C 1306
Michael M. Mihm, *Judge.*

ORDER

On April 16, 1990, plaintiff-appellant filed a petition for rehearing. All of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

APPENDIX D

Tomlinson Deposition Excerpt

[310] A That is correct.

Q When had the Public Safety Committee met and recommended the action which the City Council evidently took as evidence by this Exhibit No. Two to the Smart deposition?

A As I recall, it was the night before.

Q The night before?

A Before the Council meeting. I'm just saying recall.

Q Is the recommended probation of Swank and the dismissal of Totsch, are they related events in terms of the personnel in the police department?

A We felt that we needed to get our position of police protection and performance improved. chief Totsch had been on probation for a 90-day period. He either had to be removed by the end of July or dismissed. And at the same time we had been made aware of Officer Swank not performing the duties that he was required to do.

Q Okay. You had been made aware — you say "we" had been made aware. Are you saying we as in members of the Public Safety Commitee had been made aware?

A That's correct.

Q By whom had you been aware of that?

[311] A Former Safety Committee member, Jim Spees, who is presently an alderman.

Q By Jim Spees?

A He's an alderman at present. He was on the Safety Committee meeting at the time the discrepancy was noted.

Q All right. Was it perceived that Totsch and Swank were together somehow derelict in their duties?

MR. PRETORIUS: Together?

A They are not in coalition.

Q Are the Swank and the Totsch cases related in any fashion?

A We felt there was because at that time we gave him this we felt that Gary had not had the proper instruction in the performance of his position.

Q Okay. So you felt that somehow Totsch had failed to properly advise Swank in how to be a good police officer?

A That is what we felt.

Q Okay. And you made — and the Public Safety Committee with you as it's chairman, made the City Council aware of your feelings in that respect, is that right?

A That is correct.

[312] Q All right. Now, how old a guy is Spees?

A I'm just going to guess that he's around 35.

Q What's his occupation?

A He's a farmer.

Q But he lives in the City of Carthage?

A Correct.

Q What did he tell you was wrong with Gary Swank and when did he tell you?

A I can't put a time frame on it. It was back when we were on the City Council Safety Committee together. At that time Bob Getz was chairman and Spees and myself were members.

Q Okay. What did Spees tell you?

A Spees was also on the Public Works Committee and we had had snow that evening. He went by Gary Swank's house. A patrol car was still sitting there snow covered, no tracks, and yet his log showed that he was on duty that evening. In other words, we felt that there was no patrol made even though his log said he was still on duty.

Q When did this happen?

A I can't tell you the date. This was presented to us, and we made Chief Totsch aware of it, and his remark was you can't believe that little cotton picker. That's * * *

[316] to the form of that question and instruct the witness not to answer it.

Q Is there any provision in the City Code of the City of Carthage which you understand to give you authority to have put Gary Swank on probation?

A I'm not of knowledge to answer that.

Q I'm asking you are you aware of any provision?

A I said I have no knowledge of that to answer whether there's any provision in there or not.

Q Who's idea was it to put him on probation?

A The Committee's.

Q Was Reed in this event?

A I can't say that he was more than anyone else.

Q Who suggested the term probation?

MR. PRETORIUS: If you recall.

A I can't say. What we were doing is putting the man on notice that we needed an improvement. We were giving him the

benefit of the doubt that he had not been properly instructed by Chief Totsch, and that's when I handed Gary this approximately two days later, and I'm not clear on the date, two or three. We talked for 45 minutes of the deficiencies and Gary ended up — he said, now I know what is expected of me. I can do it. * * *

[321] Q What was his name, Robinson?

A Robinson.

Q Did he tell you?

A Yes.

Q Where did he go?

A He's here in town, the Deputy Sheriff's dispatcher I guess is what you call it.

Q Okay. Now, so we've got the car in the snow, daily logs, varying hours, honesty, the unequal treatment. Anything else?

MR. PRETORIUS: Related to this document?

Q Related to Exhibit Two. Pardon me, Mr. Tomlinson.

A Nothing that I can recall at this time.

Q Okay. Now, did you discuss at this special meeting of the Public Safety Committee all of these five circumstances?

A With the Committee, not with Officer Swank.

Q With the Committee?

A Officer Swank was not present nor any other police.

Q Okay. And it was on the strength of the conversation that you all had at this special meeting of [322] the Committee that you then drafted Exhibit Two, right?

A That is correct.

Q And you hand delivered this document to Swank, right?

A That is correct.

Q Where did you hand deliver it?

A The City office.

Q What happened when you handed it to him? Did you say here Gary, read this, or did you tell him what happened?

A The first thing that I did was I apologized to the man because the coffee shop rumor had it that he was fired like we determined Chief Totsch.

Q I see.

A And this was all out of an executive Committee meeting, I mean an executive Council meeting, and I had to apologize to the man for getting this coffee shop rumor out to him before the facts got there.

Q Because, in fact, you were not intending to fire him at this time.

A That's correct. We were asking for an improvement in his performance. We had no intention of firing a man if he complied with what we wanted. * * *

[324] Q Is it your understanding or perception that when the Chief is not unavailable, he is the singular immediate supervisor?

A That is correct.

Q All right. Now, Mr. Tomlinson, between the date of this document, July 23, 1986, which is Exhibit No. Two and September 25, 1986, were you ever advised by anyone, Chief Smart or anyone else, or did you otherwise perceive that Gary Swank was making insufficient progress toward adequate compliance with your instructions as per Exhibit No. Two?

A I was never advised. I observed the logs had improved.

Q You observed that the logs had improved. What about — were there any car in the snow incidents between July 23 and October 14?

A I don't believe there was any snow.

Q So the answer is no?

A No.

Q What about the varying of the hours?

A That was partly reflected in the log.

Q So he improved that as well, it that correct?

A Yes.

[325] Q What about the honesty? Were there any circumstance of dishonesty between October 23, 1986, and September 25, 1986?

MR. PRETORIUS: Between those dates?

MR. BISBEE: Yes.

A Not to me.

Q Was there any circumstance wherein you perceived that Gary Swank had unequally or disparately enforced the law between July 23, 1986, and September 25, 1986.

A It was never brought to my attention if there was.

Q So is it fair to state, Mr. Tomlison, that between July 23, '86, and September 25, '86, Gary Swank was making adequate compliance from your vantage point with the mandate of Exhibit Two, which is the so-called probation document of July 23, '86?

A I felt that he had.

Q All right. Did you ever hear any comments to the contrary from any member of the City Council or any other member of the Public Safety Committee of the City of Carthage?

A Between those dates?

[326] Q That's correct.

A No, I had not.

Q So is it fair to state that disregarding the circumstances of September 25, for those circumstances, that Gary Swank would have been taken off probation on October 1, 1986, from the standpoint of your own judgment?

A That is fair.

Q Okay. Now, Mr. Tomlinson, when did you first hear or were you otherwise apprised of the circumstances of September 25, 1986, and by whom?

A Actually Mayor Nightingale indicated to me at church since we both go to the same church that there was a problem with an officer. He didn't say who or what the problem was. And he said it might be resolved because he may have a resignation. Then about Wednesday of that week —

Q Wait a minute. Nightingale indicated at church which is on a Sunday?

A On a Sunday.

Q That there was a problem with an officer?

A He didn't say who or what.

Q But that it might be resolved by resignation?

A By their resignation. • • •

Myers Deposition Excerpt

[401] Q Now, let me ask you this, Mr. Myers, after Exhibit No. 1 was issued — by the way, who typed it up, do you know?

A No, I don't.

Q After it was issued did you undertake to personally monitor Gary Swank's performance?

A No.

Q Are you aware whether or not any other member of the Public Safety Committee or the city council for that matter undertook to monitor Gary Swank's performance?

A Not that I had knowledge of.

Q Are you aware of any comments, reports, statements or whatever after July 23, '86 to the effect that Gary Swank's performance respecting his writing reports and his staggering his hours was for any reason deficient?

A At one of our meetings after this it was reported that they had improved and he would probably be going off probation at the end of this time.

Q So the thing that sticks in your mind, Mr. Myers, is that there was some meeting after July 23, '86 of the Public Safety Committee when it was revealed that Swank's performance had indeed improved respecting his **[402]** reports and the staggering of his hours, correct?

A Yes, I think that's right.

Q And it was concluded, as I understand your testimony, and please correct me if I'm wrong, that because of that he was going to be going off probation, right?

MR. GAY: I object, that's not what he said. He said he might be going off, not that he would be.

Q Okay. Do you recall when approximately after July 23, '86, Mr. Myers, that meeting occurred when you heard what you have just testified to?

A It was at one of the regular monthly Safety Committee's meetings.

Q Do you remember who made the report to which you have just alluded?

A No, I don't, any name.

Q Was it a member of the Public Safety Committee?

A I'm not sure whether it was a member of the committee or whether it was the chief.

Q Okay. Did the chief regularly attend the Public Safety Committee meetings during the time you were on the Public Safety Committee?

[403] A Most of the time he would, at least part of the meeting.

Q And that included both Pete Totsch and Jim Smart, is that right?

A I don't remember Totsch.

Q You don't remember Totsch ever attending a Public Safety Committee meeting?

A He may have, but I don't remember it.

Q Do I understand that Chief Smart made a regular practice of attending the Public Safety Committee meetings?

A Well, there was times when he was on duty, but I think most of the time that he would show up sometime during the evening.

Q Okay.

A There may have been times when he didn't at some meetings.

Q How many members served on the Public Safety Committee during the period of time you were on it between '85 and '87?

A Reed and, was there three or — I can't think of anybody but three right now, and at the last there was somebody besides Reed on there.

[404] Q You, Mr. Reed and Mr. Tomlinson, is that correct?

A I think that was it. I don't remember any other.

Q All right. Mr. Myers, after you heard the report from whomever it came at one of the regular monthly meetings of the Public Safety Committee that Swank's performance had improved and he was likely to go off probation did it happen that you sometime thereafter heard any other reports concerning Gary Swank?

A Yes.

Q What did you next hear and when did you hear it, as you recall?

A I don't remember whether that was a special meeting or a regular meeting, but he had been called in, I don't remember whether that was a regular meeting or whether that was called meeting.

Q But there was another meeting, right?

A Yeah.

Q And you don't remember whether it was a special meeting or a regular meeting, correct?

A I don't remember.

Q In any event, whatever form of meeting it was, **[405]** what did you hear at this next meeting, Mr. Myers?

A Well, there was a report of his taking a girl for a ride on his motorcycle.

Q Do you remember who attended this particular meeting respecting, pardon me, the meeting when you hear about the ride on the motorcycle?

A I think all, I think the committee and Jim, I'm not sure whether Nightingale was there or not.

Q The committee and Jim meaning Jim Smart?

A Yes.

Q And maybe Jim Nightingale?

A I wouldn't say for sure. He might have been, he was at some of the meetings.

Q What did you hear at this particular meeting, Mr. Myers?

A Well, first heard that he had taken this girl for a ride on his motorcycle.

Q What else did you hear respecting the ride on the motorcyle or anything else at this meeting?

A That the chief had asked him about it.

Q All right.

A And first he said he didn't do it.

Q All right. * * *

Smart Deposition Excerpt

[253] will object to it.

Q Are you directing him not to answer?

MR. PRETORIUS: Yes.

Q All right. Is it your impression, Mr. Smart, that without Exhibit No. 3 Mr. Swank never would have been fired?

A You are referring to this exhibit?

Q That's correct, the one drafted by you.

A That judgment would have been left up to the committee and the council.

Q I am asking for your impression.

A Probably not.

Q All right.

A But there again, it wasn't for me to say.

Q But then again, you are the one who drafted Exhibit No. 3 and brought it to the attention of the committee and the council, isn't that right?

A That's correct.

Q And you did so on the advice of Nightingale, didn't you?

A Well, I don't know if that is a fair statement.

Q Tell me what is fair.

A I had asked him what the proper procedure was * * *

Tomlinson Deposition Excerpt

[347] Committe meeting reduced to writing?

A No.

Q How was the recommendation of the Public Safety Committee communicated to the City Council?

A We went in to an executive session to discuss personnel which is proper.

Q Wait a minute. You went into an executive session at the night of the City Council meeting?

A Correct.

Q On October 14?

A Correct.

Q Was there any communication of what happened on October 6 to the City Council or any member of the City Council not including the Public Safety Committee members prior to October 14?

A Not to my knowledge.

Q All right. In any event, the debate when Swank and Smart was out of the room was whether or not you are going to recommend the dismissal on the three write-up basis or on this incident alone, right?

A That is correct.

Q So it's fair to state, is it not, sir, that if this September 25 incident had not occurred, Gary Swank [348] would not have been fired, right?

A That's my feeling.

Q So you summoned Swank and Smart back into the room, right?

A Correct.

Q And you communicated that Swank was to be suspended with pay?

A Correct.

Q And he was to turn over his badge?

A Badge and keys.

Q What happened?

A I asked him if he had any comments.

Q What did he say?

A He said aren't I entitled to a hearing.

Q I see.

A At that time Mayor Nightingale said if you don't think you have had a hearing, Gary, we will set one up.

Q I see.

A And Gary said, well, I guess I have and says I'm not going to sue you anyway.

Q All right. So Gary said aren't I entitled to a hearing?

Nightingale Deposition Excerpt

[365] Q All right. Do you believe then that Exhibit 3, page two, describes in whole or in part coming as it does from one of your department heads, namely the Police Chief, Gary Swank's performance as an employee of the City of Carthage?

MR. PRETORIUS: I will object to the question, it's very vague. You know, this man has been a police officer for a number of years and to ask whether a document pertaining to one incident describes his whole performance as a police officer —

Q That wasn't the question. I said describes in whole or in part his performance as a police officer.

A That particular evening?

Q Okay. Would Gary Swank have been fired but for the incident of the motorcycle ride as of September 25, 1986 so far as you are aware?

A Would he have been fired if he hadn't given the motorcycle ride, is that what you are asking?

Q That's right.

A I would say no.

Q Okay. Have you heard any opposite opinion given by any member of the Carthage City Council, namely, that he would have been fired irrespective of the * * *

APPENDIX E

Smart Deposition Excerpt

[221] necessary.

Q Now, when you say "dealt with," what do you mean "dealt with," you want the situation dealt with?

A My feelings at the time was this. Had I had the sole power to hire and fire Officer Swank on the spot I would have done so. I would have fired him over this incident.

Q Okay.

A That's how strongly I felt about it.

Q Okay. So, in other words, is it fair to state, sir, that you went to Nightingale and you said about that, you want to get rid of Swank on the basis of the incident?

A I never wanted to get rid of Swank. I never, ever wanted to get rid of Swank. But we had an incident here that I felt was serious in nature. It was a situation that I was not going to tolerate out of any police officer in my police department as long as I was heading the department.

Q Okay.

A And my feeling was that he should be fired.

Q All right. And you told that to Nightingale at this meeting between, sometime between October 1, 1986 and [222] October 6, 1986?

A I never made an issue out of me not heading the department that would tolerate it because I didn't want that to be part of the decision-making here. As I recall though, I did reflect that in my opinion he should be fired for this incident.

Q Okay. Did Mayor Nightingale in this conversation you were having with him in your pickup truck, did he share your

view that Swank ought to go on the basis of what you had just told him which the substance of what appears in page one of Exhibit 3?

A No, he never came right out and, as I recall, told me that he would be fired for it. He was in agreement that it was a serious incident, that didn't need to be — that did need to be dealt with in some manner.

Q Okay. Did he tell you what you ought to do, Nightingale that is? And if so, tell us what he told you.

A He informed me that I had the authority which I wasn't clear on until then that I could go to Officer Swank and ask for his resignation.

Q Okay.

A Then he informed me of the proper procedures if he did not resign, for me to, that this matter would have **[223]** to be brought to the attention of the Public Safety Committee.

Q Okay.

A If Officer Swank did not resign and that —

Q Okay.

A That's it.

Q Do I understand though you had already gone to Swank before you had this conversation with Nightingale or am I incorrect in that?

A I had discussed the incident with Officer Swank prior to going to Nightingale.

Q Okay. And you discussed it with Swank either September 30th or October 1st or somewhere in that time frame, is that right?

A It was right in that time frame, yes, sir.

Q All right. Is there anything which appears on this page one of Exhibit 3 that you did not tell Swank?

That's a dumb question, let me ask it this way.

What did you tell Swank when you met with him?

A The first time?

Q How many times were there?

A Well, there was this time —

MR. PRETORIUS: Don't say "this time," **[224]** describe it a little better.

A Okay, there was this October, approximately October 1st meeting that I had with him.

Q Okay.

A Prior to discussing it with Mayor Nightingale. Then after my conversation with Mayor Nightingale the next evening which would have been approximately October 2nd I met with Officer Swank again at the police department and informed him how I had to deal with this.

Q Okay.

A Then was the, a short phone conversation that he and I had three to four days later.

Q Okay.

A We are getting to approximately October 5th, and then our meeting, Public Safety Commitee meeting on October 6th.

Q Okay. Now, tell me what you told him in the first meeting which is October 1st or September 30th or whenever.

A Okay. I asked him about the incident.

Q What did you ask him? Tell me what you asked.

A I told him it was brought to my attention that he had been, I forget the exact wording I used, but **[225]** messing around with a college girl.

Q Okay.

A At the campus.

Q Okay. You said "messing around" or words to that effect?

A Those weren't my exact words, it was to the effect that he was seeing a college girl.

Q All right.

A And I informed him —

Q Let me ask you this. Was the implication of whatever the words were that you used that he was having some kind of an affair with the college girl?

A It was a possibility that he was having an affair with a college girl.

Q All right. So let me understand. You told him that there was the possibility that he was having an affair with a college girl, you were aware of that information, that is what you told him in part, right?

A Right.

Q All right. Go on, what else did you tell him?

A I told him that how detrimental that could be to the image of the police department.

Q Okay. * * *

APPENDIX F

City Council Minutes

CARTHAGE CITY COUNCIL
REGULAR MEETING — OCTOBER 14, 1986
EXECUTIVE SESSION — 10:05 P.M.

The Council went into executive session at 10:05 P.M. All eight aldermen were present: Reed, Myers, Bethard, Spees, Tomlinson, Goetz, McHugh and Gahle.

Chairman of the Public Safety Committee Tomlinson reported the following facts concerning Officer Gary Swank:

> Swank has been on probation from July 23, 1986 to Oct. 1, 1986. Swank has been written up three times within the past 5 months. At the regular Public Safety Committee meeting held on October 6, 1986, a hearing was held with the committee, Swank and City Marshal Jim Smart being present. An incident which occurred on September 25, 1986 involving Officer Swank's meeting with a female college student while he was off duty was discussed. City Marshal Jim Smart had met with Swank on October 1, 1986 and interviewed him regarding the incident, which Smart felt was conduct unbecoming to a police officer.

As a result of the hearing, October 6, 1986, Officer Swank was immediately suspended with pay pending action of the City Council at the regular meeting October 14, 1986.

The committee recommends that Officer Swank's employment with the city be terminated immediately.

A lengthy discussion followed in which some of the aldermen felt there is not just reason for Officer Swank's dismissal since the incident of September 25, 1986 occurred while Swank was off duty and on his own time. Some, however, felt that was just reason since this was his third write-up as well as the incident

damaging the good relationship the City Police and City had with the college students and college personnel.

At 10:50 P.M. motion was made by Alderman Tomlinson, seconded by Reed, that the meeting return to regular session.

/s/ Jean Long Teel
City Clerk

APPENDIX G

Tina Millin's Statement to Smart

[30A] Date 10-06-86 Page No. One

STATEMENT OF: TINA MILLIN, AGE 17
BLACKWELL HALL, ROOM 303
ROBERT MORRIS COLLEGE
357-3356

Q.S. Tina, do you know why I'd like to talk to you?

A.M. I suppose it has something to do with me getting on a motorcycle with a guy the other night. I asked the security guard what you guys were doing out at school tonight and he said you were looking for a girl that had gotten on a motorcycle with a guy the Wednesday night before last. I told him I had and so we got hold of you.

Q.S. The incident I want to talk to you about occurred September 24. Actually it was the early morning hours of the 25th because it was after midnight that night. It was a week ago last Wednesday night. Do you remember that night?

A.M. Yes, I do, because that was the night a bus came here to take us to the Outside Inn in Ft. Madison and you guys stopped the bus so nobody went over.

Q.S. That's the night. Were you sitting on a picnic table at the corner of College Avenue and the highway that night after midnight, with another girl?

A.M. Yes, I was.

Q.S. Were you approached by a guy on a motorcycle and go for a ride with him?

A.M. Yes.

Q.S. Did you know the guy?

A.M. I knew his name was Gary. I'd seen him ride around here on his bike before, but that's about all I knew then. He seemed like a nice guy. I found out from some other girls the next day that his last name was Swank and that he was a policeman and that he was married. But that night I just knew him by his first name.

Q.S. How did you happen to get on the bike with him that night?

A.M. Well, the other girl and I were sitting there on the table and he had driven by a couple of times and he waved. Then he came up to the stop sign there and stopped and he's got this cute little elephant on his bike and I asked him if I could have it or something like that. Then he pulled over to the curb where we were at and we just started talking.

Q.S. Who was that other girl with you?

A.M. I don't know her name. She has dark brown hair and stays in Tubman Hall and works in the dining hall. I know her when I see her is all. I can find out her name.

Q.S. Had you ever seen around Gary before that night?

A.M. Not to talk to him. Like I said, I'd seen him riding around campus on his bike before.

Q.S. What did you two talk about that night?

A.M. He asked me about school and we talked about courses I was taking for a while and then we talked about his bike for a while. I used to have a boyfriend that had a bike and I used to ride with him. Things like that.

Q.S. Did Gary ever mention to you that he was married?

A.M. No. In fact I asked him if he was married and his exact words were "Who wants to be married." I thought,

"Oh, O.K." So I just thought he wasn't and I looked for a wedding band on his finger and he didn't have one on.

Q.S. Did he tell you he was a police officer?

A.M. No, but I found out later because that next weekend I saw him driving around school in a police car and he was in uniform and I recognized him.

Q.S. How was it that you ended up riding on the bike with him?

A.M. We were just talking about riding and I got on the bike and we took off for a while.

Q.S. What time would it have been when you did that?

[31A] (PAGE TWO)

A.M. I think it would have been around twenty til one when we left and it about five or ten after one when we got back.

Q.S. Where did you go?

A.M. He took me out around the lake and then down some side roads in town and then we came back to school.

Q.S. Did you make any stops between?

A.M. No.

Q.S. When you parted company, was there any talk about seeing each other again in the future?

A.M. We never talked about anything like that.

Q.S. When did you find out who he was?

A.M. I think it was the next day, some of the girls told me that his last name was Swank and they thought he was married. I look up his name in the phone book and it listed

his wife's name, too. I think it was Sally. I knew then that he really was married. I thought, "What's he doing? Why wasn't he home with his wife?" Then a day or so later, it was the weekend, I saw him driving the police car around the campus, and then I knew the rumor that he was a policeman was true too.

Q.S. How did that make you feel?

A.M. I was kinda hurt, I guess. I felt like I had been taken advantage of. I thought he was terrible for doing what he'd done, instead of staying home with his wife.

Q.S. How did you feel towards the police department over this?

A.M. I really don't blame you or your department. At home, we've got a couple of policemen who do things they shouldn't. I blame them. I don't blame the whole police department. I see Gary as the "rotten apple" in the police department.

Q.S. Tina, I hate to ask, but was there any physical stuff, alcohol, or other drugs involved in the encounter with Gary that night?

A.M. No. We just talked, like I said. He seemed like a nice guy at the time.

Q.S. I expect there will be a hearing about this matter. Would you be willing to testify about what you've told me concerning this incident, if it became necessary?

A.M. Well, ... I don't really want to, but yes, if it needs to be done, I will.

Q.S. When I put this conversation we've just had in writing, would you come back in and read it and sign it?

A.M. Yes. You can just call the pay phone in my dorm and get in touch with me. It's that phone number I already gave you.

XXXXXXXXXX END OF STATEMENT XXXXXXXXXX

/s/ Tina Millin

APPENDIX H

Smart Deposition Excerpt

[242] Q Why had you stopped the bus?

A We hadn't stopped it. What happened was they were on campus attempting to get college girls to leave a chaperoned party to get on the bus to go to the Outside Inn and we were called by the college officials to ask those people to leave the campus.

Q Oh, I see. So it was part of a baby sitting kind of function that caused you to stop the bus, is that right?

A Right. I guess you could phrase it that way.

Q Respecting this Exhibit No. 4, Mr. Smart, do you have any reason to disbelieve anything she has told you in there?

A No.

Q Even as you have paraphrased it?

A No reason at all not to believe what she put in there.

Q Let me ask you this. Do you still believe that Gary Swank had an affair with her?

MR. PRETORIUS: That is not a fair question because the word was used previously but never defined. What do you mean by an affair?

Q What did you mean by an affair when you said * * *

APPENDIX I

Smart Deposition Excerpt

[237] A I believe she's still enrolled there.

Q All right. Okay. So now, did you personally direct Lawrence to go get her after he had gotten her name?

A Yes, I did.

Q Did she know before 2 a.m., the morning of October 7th or the late night hours of October 6th she was going to be brought to the police department?

A No, I don't believe she did.

Q All right. At what time was she picked up by Officer Lawrence?

A It was approximately 2 a.m.

Q Did you just send a squad car out and say, "We would like you down at the police station," or what?

A No, she had been gone with some girls for the evening and had just gotten back on campus and that's when the security guard had located her.

Q I see.

A As I recall.

Q Did you take a statement from her?

A Yes, I did.

Q And is that statement reduced to writing?

A Yes, it is.

[238] Q Where it is?

A My attorney has a copy of it and I have the original.

Q All right. Why don't you tell us what she said?

MR. PRETORIUS: John, would you like a copy of that now?

Q Yes.

(Whereupon a short recess was taken.)

MR. BISBEE: On the record.

Did you just first learn this girl's name and her identification late night October 6th or the early morning of October 7th, Mr. Smart?

A That's correct.

Q Okay. Why don't we mark this as Exhibit No. 4.

(Whereupon the document was marked Smart Deposition Exhibit 4 for identification.)

Q You have been handed, Mr. Smart, what has been marked as Deposition Exhibit No. 4 and I ask you to identify that.

A Yes, I can.

Q What is it?

[239] That is the statement I took from Tina Millin on that evening reduced to writing.

Q Who was present, did I ask this, who was present when you took this statement?

A Myself, Tina Millin and Officer Keith Lawrence.

Q Okay. Who transcribed it?

A I did.

Q Was it a statement that was tape recorded?

A No, it wasn't.

Q It was not tape recorded. It appears to be in the form of a transcript, was there someone there to take the shorthand notes as to what she was saying?

A I took the shorthand notes.

Q Do you take shorthand?

A No, I don't take shorthand, I took notes on our conversation because of the hour of the night. And then after she left, using those notes, I reduced it to writing and had her come in later and proofread it and sign it.

Q Okay. So this was not tape recorded, it was no official shorthand reporting of the statement, rather, you simply took your own notes as you and she were talking, it that correct?

A That's correct.

[240] Q And you then purported to reduce your notes to what appears to be a dialogue, it that correct?

A That's correct.

Q Or a colloquy or whatever you want to call it, okay. When did she come in and proofread it, as you say, and sign it?

A As I recall, it was sometime the following week because she had gone home over the weekend for school break or something. But she was not able to come in until sometime the following week to read the statement over and sign it.

Q Okay. Did she just appear in your office voluntarily to go over it and sign it?

A Yes, I gave her a call and we made an appointment for her to come in which she did on her own.

Q Go ahead, I am sorry.

A And she signed it.

Q Approximately how much time did she take reading the statement?

A Well, she didn't rush right through it. I am going to say that that encounter lasted approximately 15 minutes. I handed it to her when she walked in almost immediately and she set down and read it through and we **[241]** discussed one correction on it which is not reflected on this particular paper but it's on the original.

Q What corrections that, will you tell us about it?

A Okay. Okay. It was on her second answer to my second question where we were trying to clarify which night I was wanting to talk to her about. She corrected me on this and we deleted everything after, "Yes, I do." We deleted "because that was the night a bus came here to take us to the Outside Inn in Fort Madison and you guys stopped the bus so nobody went over." We deleted that part of the answer.

Q Yes. why is that, why did you delete that part of the answer?

A Because after reading this she wasn't, she didn't remember the bus part of this incident. So rather than have her confused to correct this to her satisfaction so that she was satisfied with this particular statement, we deleted that part of that answer.

Q Well, let me ask you this. Had you guys, I assume, meaning the police department, had you guys ever stopped a bus which was enroute out of town?

A On that particular night we did, yes. * * *

APPENDIX J

Smart Deposition Excerpt

[293] the authority to enforce college rules?

A We don't stay out there and enforce all the regulations for them. However, when they have a problem that they feel like they can't handle, they do call us and ask for our assistance.

Q Has any official of the Robert Morris College have telephoned or written or communicated with you in any fashion whatsoever that they felt that Gary Swank had broken a college rule as a result of this incident of September 25, 1986?

A I don't know if any college official has, no.

Q You don't know? Has any college offficial communicated to you that they felt, that he or she felt that Gary Swank had violated that college rule as a result of this incident of September 25, 1986?

A Not that I recall.

Q You haven't heard about it from Lawrence or Nightingale or Tomlinson here, have you?

A That a college official —

Q Yes.

A — has pointed out that Swank broke rules?

Q Right.

A No, I haven't.

[294] Q All right. Now, I went through a list of questions earlier, and I would like some additional answers to these. You say that Exhibit Three, page two does charge Swank with interference with the Police Department's ability to enforce the laws and to make arrests on the Robert Morris Campus. Okay.

The question is this: What evidence do you have that it has impeded the ability of the Carthage Police Department to enforce the laws or make arrests?

MR. PRETORIUS: You are talking about things that have occurred since that time?

Q Anytime. What evidence do you have that it has impeded your ability to enforce the laws or make arrests?

MR. PRETORIUS: I'm not going to tell him not the answer. He'll answer all these questions, but I want the record to show an objection to any question that relates to things that have occurred since the incident. It could not have any relevance or materiality to this. If you can answer the question, go ahead.

A Could you ask the question again please?

(Question read.)

A It was my concern —

Q The question is this: Let me interrupt. I [295] want to know what evidence do you have that it has done so?

MR. PRETORIUS: I mean he's not talking about your concerns or what you thought might happen. Just things that you know of that did happen. Any evidence that you had. If there's none, just say so.

A Can I discuss this with you off the record?

MR. PRETORIUS: Not now. You do have to answer his questions.

A At this time I don't have any evidence, but I do think I need a clarification.

Q Okay. Now, the question next is you indicated that you construed Exhibit Three, page two as charging Gary Swank with having interfered with the Carthage Police Department to solve

problems in the Robert Morris Campus and the question is this: What evidence do you have that it has done so?

MR. PRETORIUS: Again I'm objecting to all of these. He's asking you for any evidence that you know of subsequent to this that that incident caused a problem.

A I have no evidence.

Q You indicated that you construe Exhibit Three, page two as charging Gary Swank with interfering with the **[296]** ability of the Police Department to check on the well-being of students on the Robert Morris Campus and what I want to know is this: What evidence do you have that it has done so?

A I have no evidence, but it does need clarification.

Q You indicated earlier that you construed Exhibit Three, page two as charging Gary Swank with interfering with the Carthage Police Department's ability to discuss problem students on the Robert Morris Campus with their parents and what I want to know is this: What evidence do you have that it has done so?

A I have no evidence of that either, but it does need clarification.

Q You indicated that you construed Exhibit Three, page 2 as charging Gary Swank with interference of the Carthage Police Department's ability to help save the lives of students who attempted suicide and what I want to know is what evidence do you have that it has done so?

A I have none, but it does need clarification.

Q You indicated earlier that you construed Exhibit Three page two as charging Gary Swank with **[297]** interference of the Carthage Police Department's ability to guide students away from suicide and what I want to know is what evidence do you have that it has done so?

A I have none, but it does need clarification.

Q You indicate that you construed Exhibit Three, page two as saying that Gary Swank has interfered with the Carthage Police Department's ability to help students when they have car trouble. I take it you had some problem — will strike that question, okay, unless you want to tell me? Do you have any evidence that this incident with Gary Swank and Tina Millin impeded your ability to help students with car trouble?

A I have no evidence.

Q All right. You indicated earlier that you construed Exhibit Three, page two as charging Gary Swank with having interfered with the Police Department's ability to discuss the students' darkest secrets with the Carthage Police Department or I guess the families' darkest secrets. That's what you said, it that right?

A Right.

Q What I want to know is what evidence do you have that it has done so?

A I don't have any specific evidence.

[298] Q Do you have any general evidence?

A It does need clarification.

Q You indicated earlier that you construe Exhibit Three, page two as charging Gary Swank with having impeded the ability of the Carthage Police Department to be trustworthy. What I want to know is what evidence do you have it has done so?

A I guess it depends on how you measure the community's feelings in that you're trustworthy.

Q I want to know what evidence you have that the Gary Swank incident with Tina Millin on September 25, 1986, caused or impeded the ability of the police department to be trustworthy.

A I can't offer any specific evidence.

Q Thank you. You said that you construe Exhibit Three, page two as charging Gary Swank with interfering with the sacred trust bestowed upon the Carthage Police Department by the community. I want to know what evidence you have it has done so.

A That sacred trust is very hard to measure.

Q I want to know what evidence you have that the Gary Swank incident with Tina Millin has caused a grave injustice to that sacred trust or having interfered with **[299]** that sacred trust?

A I cannot cite specific incidents that indicate that.

Q All right. You indicated earlier you construe Exhibit Three, page two as charging Gary Swank with having caused a "grave injustice" to be inflicted upon the Carthage Police Department and the citizens of Carthage. I want to know first what you mean by grave injustice.

A Murv, were you going to say something?

MR. PRETORIUS: No.

A We work very hard to gain the support and trust of this community.

Q I bet you do.

A And then I feel like an incident such as this is very detrimental to that accomplishment, and I feel that that is a grave injustice to the department.

Q What evidence do you have that it has caused you grave injustice, however you define grave injustice, which you have not done?

MR. PRETORIUS: Well, I will object to the statement, but you can answer the question portion of it.

A Again that's very hard to measure how the community opinion has changed about the police department.

[300] Q Let me ask you this: Has any citizen come up to you and said, boy, in the wake of this Gary Swank thing out here, I got no trust for your cops. They are all out there on the make or something. Has anybody ever said that to you?

MR. PRETORIUS: In those words?

MR. BISBEE: Words which might roughly convey that meaning.

Q Has anybody ever said that to you and if so, I want to know who.

A I know that this community has mixed emotions about this police department.

Q The question I asked you is has any citizen ever come up to you and said anything like I just asked in the preceding question. Do you want the preceding question reread?

A Yes, if you would please.

(Question read.)

A I can't specify exactly who said specifically what concerning it.

MR. PRETORIUS: Was there something said? That was the question even if you can't —

A Well, I tried to point out that this community • • •

[243] earlier that you told Swank when you had a meeting with him that he might be having an affair, what did you mean by that? And I think that is pretty close to what you said.

A Well, at the time my worst fears were that he was forming a relationship with this girl while he was married which was going to destroy his marriage.

Q Okay.

A Whether it be sexual or not sexual, a relationship where they were going to definitely have strong feelings for each other, I guess that's where I will stop it, that is how I look on it.

Q And you communicated those concerns to Nightingale when you talked to him the day after or so that you talked to Swank, right?

A I know I specifically told him that all I knew for sure at that point was the fact that this girl had gotten on the motorcycle with him and left town. I think I made a remark to the effect that only they know what they did after that, something to that effect.

Q Let me ask you this. You said earlier that had you had the power to hire and fire on the spot you would have fired Gary Swank, right?

[244] A I would have, yes, sir.

Q Would you have fired Gary Swank if you had known for a fact that all he had done was take a girl for a 20 minute motorcycle ride and nothing else?

A I didn't like —

Q Just can you answer that question yes or no?

A Things that could be implicated from that.

Q Can you answer that question yes or no? If you knew for a fact that all that Gary Swank had done was take a girl for a 20

minute motorcycle ride at 12:30 in the morning would you have fired him?

MR. PRETORIUS: If he had the power.

Q If you had the power?

MR. PRETORIUS: Did he feel it was a fireable offense, dischargeable offense to fire a police officer who off duty at 12:30 in the morning took a girl for a 20 minute motorcycle ride and did nothing else?

A I probably would have.

Q That in your mind's eye is a dischargeable offense?

A For a police officer already on probation, I feel like it is.

Q I see, I see. So it's the probation here which **[245]** is the kicker, is that what you are telling us? Let me ask you, don't answer that right now, I will get to it. Going back to this Exhibit No. 4, you construe her as telling you that she did anything more than take a 20 minute motorcycle ride with him at 12:30 in the morning?

A No, that is all I read into that.

Q All right.

Q It's true, is it not, you communicated to Nightingale your concern there was going to be a relationship of some kind between a police officer and a college girl, didn't you?

MR. PRETORIUS: I think he's already answered that question.

Q No, he hasn't.

A I don't recall that I specifically mentioned that to him.

Q Did you mention it generally that was a concern of yours?

A I believe I discussed my concern of what citizens in this town would think of a situation like this and what it would do to the police department.

Q A situation like what?

A A police officer leaving campus with a girl at * * *

No. 90-173

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GARY D. SWANK,
Petitioner,

vs.

JAMES SMART, Individually and as City Marshal, City of Carthage, Illinois; JAMES R. NIGHTINGALE, Individually and as Mayor of the City of Carthage and as a member of the City Council of Carthage, Illinois; WILLIAM TOMLINSON, Individually and as a member of the Public Safety Committee of the City Council of Carthage, Illinois; WILLIAM REED, Individually and as a member of the City Council of Carthage, Illinois; RAYMOND MYERS, Individually and as a member of the City Council of Carthage, Illinois; and the CITY OF CARTHAGE, ILLINOIS, an Illinois Municipal Corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the decision of the Seventh Circuit Court of Appeals in *Swank v. City of Carthage* consistent with and mandated by applicable precedents of this Court?

2. Is that interest protected by the Constitution as "expressive association" implicated when the only "relationship" between Plaintiff, an off-duty policeman, and a student at a local college was a 20-minute motorcycle ride without prior or subsequent contact between the parties?

3. Is that interest protected by the Constitution as "individual liberty" implicated when the only "relationship" between Plaintiff, an off-duty policeman, and a student at a local college was a 20-minute motorcycle ride without prior or subsequent contact between the parties?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Statement of Facts	1
Reasons for Denying the Writ	3
A. There Is No Conflict Between The Seventh Circuit Decision In This Case And The Two Decisions Of Other Circuit Courts Of Appeals Cited By Plaintiff	3
1. In *Lutz v. City of York, Pa.*, the Third Circuit Court of Appeals Considered Whether There Is a Constitutionally-Protected Right to Intrastate Travel. This Interest Was Not Considered or Addressed By the Seventh Circuit in *Swank v. City of Carthage*	3
2. In *Flanagan v. Munger*, the Tenth Circuit Was Faced With Different Facts and Circumstances But Still Applied the Same Legal Analysis As the Seventh Circuit. The Different Result Reached By the Two Courts Is Not the Type of Conflict Which Warrants the Issuance of a Writ of Certiorari	5
B. The Decision Of The Seventh Circuit Was Rendered On The Basis Of This Court's Precedents And Does Not Conflict With Them.	7
C. The Decision Below Fully Conforms With This Court's Precedents Regarding The First And Fourteenth Amendment Protection To Be Properly Accorded Petitioner's Speech	8
Conclusion	9

TABLE OF AUTHORITIES

Page(s)

Cases:

City of Dallas v. Stanglin, ___ U.S. ___, 109 S. Ct. 1591 (1989) 4,5,6,7,8

Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989) 5,6,7

Griswold v. Connecticut, 381 U.S. 479 (1965) 7

Lutz v. City of York, PA., 889 F.2d 255 (3rd Cir. 1990) 3,4,5

Poe v. Ullman, 367 U.S. 497 (1961) 7

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 5,7,8

Swank v. City of Carthage, 898 F.2d 1247 (7th Cir. 1990) ..... *passim*

Winters v. New York, 338 U.S. 507 (1948), 510 (1948) 8

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as a member of the Public Safety Committee
of the City Council of Carthage, Illinois;
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF FACTS

Respondents have no quarrel with Petitioner's Statement of Facts so far as it goes. It does not, however, place the issues raised in this case

in proper perspective. Gary Swank had numerous problems functioning as a Carthage police officer over a period of time. During the course of his employment he had been advised by the Public Safety Committee of perceived deficiencies in his performance and the Committee's dissatisfaction ultimately resulted in his being placed on probation for a period beginning July 23, 1986, and ending October 1, 1986. The events leading to his discharge occurred while he was still on probation.

As stated by the Court of Appeals in its opinion, Petitioner's actions on September 24-25, 1986, represented an "appearance of impropriety." The Court noted that Swank, as a married man, displayed poor judgment in giving a teenage girl whom he had never met before a motorcycle ride late at night. The Court further observed that, while the incident seems trivial by itself, . . . "it *was* his third strike, so it is no surprise that he was called out."

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Between The Seventh Circuit Decision In This Case And The Two Decisions Of Other Circuit Courts Of Appeals Cited By Plaintiff.

1. In *Lutz v. City of York, Pa.*, the Third Circuit Court of Appeals Considered Whether There Is a Constitutionally-Protected Right to Intrastate Travel. This Interest Was Not Considered or Addressed By the Seventh Circuit in *Swank v. City of Carthage.*

Petitioner asserts in at least four places in his Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (hereinafter "Petition") that the Third Circuit in *Lutz v. City of York, PA.*, 889 F.2d 255 (3rd Cir. 1990), had found that "the right" which he had asserted was a fundamental right. At pages 9-10 of the Petition, he states:

> "But, in an opinion released the day after the Seventh Circuit decided this case, the Third Circuit in *Lutz v. City of York, Pa.*, (citation omitted) *held that the right asserted by Petitioner in this case is fundamental.* * * * On that basis the Third Circuit in *Lutz*, supra, held that *'the right to move freely about one's neighborhood or town, even by automobile*, is indeed "implicit in the concept of ordered liberty" and "deeply rooted in the nation's history." '(Emphasis added)

Again, in footnote 7 on page 11, Petitioner asserts:

> "[7]As observed by the Third Circuit in *Lutz, the right alleged as fundamental in this case* might be more generally posed as whether there is a fundamental right to intra as distinguished from inter-state travel. *Lutz*, supra, 899 F.2d at 258-262. (Emphasis added)

Petitioner observes, yet again, at page 12:

> *"Finding the right Petitioner is asserting in this case to be a fundamental right*, the Court in *Lutz*, supra, undertook to deter-

> mine the standard of review and to determine whether the 'anti-cruising ordinance' which was attacked in *Lutz* withstood scrutiny under that standard. (Emphasis added.)"

Finally, at page 14, Petitioner claims:

> "The Third Circuit, in *Lutz*, supra,. . . was able to conclude *that the right Petitioner has asserted in this case was indeed fundamental*. The Seventh Circuit, on the other hand, not employing any method of analysis except the concern that a public employer might be limited in its power to discipline, *concluded that the right Petitioner herein is asserting was only a 'harmless liberty' subject to regulation on any but a 'sheer unreasonableness' basis*. (Emphasis added)"

A review of the decision in *Swank v. City of Carthage*, 898 F.2d 1247 (7th Cir. 1990), plainly shows that the conduct which the Seventh Circuit classified among "harmless liberties" was not the right to intrastate travel. Rather, it was the freedom to engage in chit-chat and Petitioner's "encounter with Tina, like the encounters with strangers in a dance hall . . ." which the Court relegated to the residual bin of "harmless liberties." 898 F.2d at 1251 and 1252.

Indeed, at page 23 of the Petition, Swank concedes that Justice Stevens and Blackmun, concurring in *City of Dallas v. Stanglin*, ___ U.S. ___, 109 S.Ct. 1591 (1989) found "the very right Petitioner is asserting in this case" to be an aspect of liberty protected by the Fourteenth Amendment. His quote from *Stanglin* shows "the opportunity to make friends and enjoy the company of other people — in a dance hall or elsewhere — . . ." to the "very right."

It is apparent on the basis of these assertions that Petitioner would have this Court find a conflict between the opinions of two Courts of Appeals which were not even considering the same issues. There has never been any suggestion in this case that Respondents discharged Petitioner simply because he rode his motorcycle on and about the streets of Carthage, Illinois. Indeed, Petitioner has never advanced either claim or implication that he would have lost his job if he had not carried his young female passenger.

The heart of Petitioner's non-procedural claims has always consisted of speech, liberty, and associational interests of which Tina Millin's presence on the motorcycle was an integral part. The opinion of the Seventh Circuit reflects this focus. The 'right to intrastate travel' is nowhere mentioned because it was not an issue. Rather, the decision repeatedly refers to "the encounter" and deals with intimate and expressive association and with speech protected by either the First or Fourteenth Amendments to the Constitution.

To the extent Petitioner may be arguing simply that there is conflict in the approach used by the two Courts in determining whether an asserted right is fundamental, his argument lacks merit. The Third Circuit noted (and Petitioner has acknowledged) that there has been no determination by this Court that there is a fundamental right of intrastate travel which comprehends a right to "cruise" city streets. By contrast, the issues confronting the Seventh Circuit have been explicitly treated by this Court in its decisions in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *City of Dallas v. Stanglin*, ___ U.S. ___, 109 S.Ct. 1591 (1989). Apparently, Petitioner feels cheated by the Seventh Circuit's forbearance from reinventing the wheel.

Whatever the basis for Petitioner's claim of irreconcilable conflict between the Third Circuit's decision in *Lutz v. City of York, Pa.*, supra, and the Seventh Circuit's opinion in *Swank v. City of Carthage*, supra, it cannot survive scrutiny and should not support the issuance of a Writ of Certiorari.

2. In *Flanagan v. Munger*, the Tenth Circuit Was Faced With Different Facts and Circumstances But Still Applied the Same Legal Analysis As the Seventh Circuit. The Different Result Reached By the Two Courts Is Not the Type of Conflict Which Warrants the Issuance of a Writ of Certiorari.

Petitioner urges the Court to find a fundamental conflict between the Tenth Circuit's determination that the "public concern" test was inapplicable on the facts of *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), and the Seventh Circuit's application of the test to the facts in *Swank v. City of Carthage*, supra. There is, however, no conflict.

The crux of the Tenth Circuit's "public concern" analysis is as follows:

> "Thus, we conclude that the public concern test does not apply when public employee nonverbal protected expression does not occur at work and is not about work. Nevertheless, we believe an alternative test can be applied in these cases which can fulfill the same *function* as the public concert test." (Emphasis added) 890 F.2d at 1564.

The Court went on to describe the function of the public concern test as follows:

> "The *purpose* of the public concern test is to avoid raising personal personnel grievances to constitutional cases. This purpose is also served by a test which requires cases involving employee nonverbal expression which is not at work or about work to involve protected expression. In those cases the employee is not raising a personal personnel grievance, and it makes little sense to ask whether this speech is of public concern." (Emphasis added) 890 F.2d at 1565.

The *Flanagan* court then went on:

> "Applying the above test to this case, it is clear that plaintiffs' speech is protected expression. Sexually explicit films and the distribution of sexually explicit films have consistently been upheld as protected under the first amendment, whether under the free speech or free press clauses. (Citations omitted)." 890 F.2d at 1565.

The Seventh Circuit, on the other hand, specifically referred to the *Flanagan* court's discussion concerning the purpose of the test and found it unnecessary to address the issue. Why? Because it was equally clear that the activity of Gary Swank was *not* "protected speech." It was nothing more than that "kernel of expression" found "in almost every activity a person undertakes — for example, walking down the street, or meeting one's friends at a shopping . . ." which was found by this Court to be unprotected by the First Amendment. *City of Dallas v. Stanglin*, supra. Because there was no protected speech, the Seventh

Circuit did not perform the "public concern" analysis undertaken by the Tenth Circuit. There can, therefore, be no conflict in the two decisions and no foundation for issuance of a Writ of Certiorari.

B. The Decision Of The Seventh Circuit Was Rendered On The Basis Of This Court's Precedents And Does Not Conflict With Them.

Petitioner has claimed that his rights to expressive association, First Amendment free speech, individual liberty, and procedural due process were all infringed by the fact and manner of his discharge from the Carthage Police Department. He pressed those claims vigorously in the Seventh Circuit and the Court decided them on the basis of binding Supreme Court precedents. Petitioner now apparently complains that the Court gave insufficient consideration to Blackstone, Edmund Burke, and Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961).

As noted at page 22 of the Petition, Justice Harlan's approach in dissent was vindicated in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Since then this Court has picked its way carefully through "penumbras" and "emanations" to add, gradually and very selectively, untested rights of privacy and intimacy to the core of more traditional First Amendment rights. These decisions culminated in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which set forth definitively the rights of intimate and expressive association. It is both unnecessary and inappropriate for Courts of Appeals faced with conduct clearly defined by *Roberts* as outside the scope of expressive association to rewrite *Roberts* (beginning with Blackstone) to satisfy Petitioner's need for historical prolixity.

Similarly, *City of Dallas v. Stanglin*, supra, is dispositive of whether or not Petitioner's speech was "protected" under the First Amendment and the Seventh Circuit correctly found that it was not. Under the circumstance, even the *Flanagan v. Munger* decision, on which Petitioner has so heavily relied, would support a finding that Swank's claim was merely a "personal personnel grievance" and would not even require the balancing exercise which was performed by the Seventh Circuit.

The nature of Petitioner's interests (whether "fundamental" or not) could be and was determined on the basis of timely and binding precedents of this Court. The decision of the Seventh Circuit is not in conflict with relevant Supreme Court opinion and Petitioner's unsupported claim that it does so conflict is insufficient to justify issuance of a Writ of Certiorari.

C. The Decision Below Fully conforms With This Court's Precedents Regarding The First and Fourteenth Amendment Protection To Be Properly Accorded Petitioner's Speech.

Even though Petitioner claims in the latter part of his Brief (pages 24-30) that the Seventh Circuit's decision conflicted with Supreme Court precedents, it appears to these Respondents that it is, in fact, Petitioner who is challenging the correctness and the impact of *Roberts v. United States Jaycees*, supra, and *City of Dallas v. Stanglin*, supra. Petitioner has asserted that "[t]he Seventh Circuit's holding and analysis placed at great risk a significant amount of expressive activity engaged in by human beings in this society. This Court has never given sanction to the Seventh Circuit's approach." This assertion is patently incorrect. The Court of Appeals explicitly relied upon the *City of Dallas v. Stanglin* decision in arriving at its conclusion that "chit-chat" was subject to the "kernel of expression" exemption from First Amendment protection.

Moreover, Petitioner cites several decisions of this court acknowledging First Amendment protection of magazines and videos which are not of "any possible value to society." *Winters v. New York*, 338 U.S. 507, 510 (1948). He charges that the decision in *Stanglin* is contrary to prior decisions of the Supreme Court and has led to the "incongruous result" that the non-verbal sale and rental of sexually explicit video tapes achieved greater First Amendment protection than his "chit-chat" with Tina Millin.

It is Petitioner's argument and not the decision of the Seventh Circuit which is in conflict with current and past precedent of this court. This argument should, therefore, not serve as a basis for issuance of a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari to review the judgment and opinion of the Seventh Circuit in *Swank v. City of Carthage*, supra, should be denied.

Respectfully submitted,

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